ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED MARCH 4, 2003)
(EXCEPTIONS DUE 3-26-03)
(REPLIES TO EXCEPTIONS DUE 4-17-03)

FEDERAL MARITIME COMMISSION

DOCKET NO. 02-03

EXCLUSIVE TUG ARRANGEMENTS IN PORT CANAVERAL, FLORIDA

On February 25, 2002, the Federal Maritime Commission served an Order of Investigation and Hearing into whether the Canaveral Port Authority (CPA) violated sections 1 O(d)(1) and 1 O(d)(4) of the Shipping Act of 1984 "by failing to establish, observe and enforce just and reasonable regulations and practices relating to tug and towing services," and "by giving an undue or unreasonable preference or advantage to Seabulk, or imposing undue or unreasonable prejudice or disadvantage with respect to other potential tug providers, including Petchem and Tugz International."[1] The Commission's Bureau of Enforcement (BOE), who was made a party to this proceeding, contends that CPA has violated the 1984 Act on a continuing basis since July 21, 2000 by perpetuating its longstanding exclusive tug franchise arrangement with Hvide Marine, Inc. and its successor, Seabulk International, Inc. (Seabulk).[2] BOE seeks civil penalties and a cease and desist order prohibiting CPA from continuing to award tug franchises and requiring it to allow vessel customers of the port to choose their own tug companies. Intervenor Petchem, Inc. (Petchem) joined in BOE's request for a cease and desist order, but not for civil penalties. Respondent CPA and intervenor Seabulk contend that the 1984 Act does not provide the

[1] See Order of Investigation and Hearing, *Exclusive Tug Arrangements in Port Canaveral, Florida,* FMC Docket No. 02-03 (served February 25, 2002).

[2] Except where a reference to Hvide is necessary, both companies shall be referred to as Seabulk.

Commission with jurisdiction over tug services, the Tenth Amendment prohibits the Commission from intruding into local matters and, in any event, the tug franchise system at the port is reasonable under the circumstances. It is held:

(1) The C ommission h as c onsistently e xercised s ubject m atter j urisdiction over p orts w ith respect to exclusive tug services, based on the rationale that a marine terminal operator fulfills a terminal function related to the receiving, handling, storing or delivery of property where it usurps the right of a carrier to choose its own tug operator and conditions access to its terminal facilities upon use of an operator selected by the port.

(2) The Commission is mandated by the 1984 Act, which derives its authority from powers delegated to the federal government by the Commerce Clause of the United States Constitution, to ensure compliance by marine terminal operators, including state-run ports, with the 1984 Act and, therefore, the Tenth Amendment does not preclude the Commission from asserting jurisdiction over state-run marine terminal operators.

(3) CPA's motion to dismiss on the ground that the Commission lacks subject matterjurisdiction is denied. First, at the time that the motion was fully submitted, there existed an issue of fact as to whether CPA's tug franchise system was exclusive in nature and, thus, transformed into a terminal function related to the receiving, handling, storing or delivery of property. Second, in the companion show cause proceeding, the Commission recently found that the Seabulk tug franchise is a *de facto* exclusive arrangement and that finding precludes any further litigation relating to this issue.

(4) The facts and circumstances have significantly changed since 1984, when the Commission found that CPA's practice of requiring that vessels use the tug services of only one tug operator, Seabulk, was not unreasonable. By 2000, CPA, a state-run marine terminal operator, had failed to establish and implement reasonable regulations and practices for the award of tug service franchises, aggressively sought to preserve Seabulk's exclusive commercial tug franchise, promoted Seabulk's ability to regain control of the military tug service in the port by convincing the U.S. Navy not to renew Petchem's contract, **received** tug service proposals from qualified tug operators, Seabulk encountered bankruptcy and pled guilty to a felony, there w ere numerous requests b y v essel c ustomers t o u se o ther t ug operators, and there was a substantial increase in the demand for commercial and military tug services in the port.

(5) CPA's practices gave undue and unreasonable preference to Seabulk by exempting it from having to demonstrate "convenience and necessity" for its franchise, but then applying it to Petchem and completely ignoring Tugz's application, thereby preserving Seabulk's monopoly over commercial tug services in the port. CPA's practices resulted in further prejudice and disadvantage to Petchem, Tugz and other prospective tug operators when CPA convinced Military staff at Port Canaveral not to renew Petchem's tug service contract,

thereby resulting in Seabulk becoming the only tug operator for the commercial and military work in the port.

(6) CPA, a public authority created by the State of Florida, is assessed a civil penalty in the amount of $2 14,500 for 858 days of continuing violations as a punitive measure with respect to its unreasonable practices and as a deterrence to it and other marine terminal operators who engage in discriminatory conduct.

(7) CPA is ordered to cease and desist from operating a tug service franchise operation. Any other form of competitive process administered by CPA is insufficient, given its longstanding history of preferential treatment toward Seabulk and unreasonable practices towards prospective tug operators. Accordingly, any vessel docking or undocking at the port shall be permitted to select the tug operator of its choice and CPA shall not in any way restrict or impede this process in any respect.

Charles L. Haslup, III, Zoraya B. De La Cruz and *Cory R. Cinque* for the Bureau of Enforcement.

Harold T. Bistline, Edward J. Sheppard, Edward J. Gill, Jr. and *Suzanne L. Montgomery* for respondent Canaveral Port Authority.

C. Jonathan Benner, D. Michael Hurst, Jr., and *Sean T. Connaughton* for intervenor Petchem, Inc.

Michael Joseph, Joseph O. Click and *Alan M. Freeman* for intervenor Seabulk International, Inc.

INITIAL DECISION[3] OF MICHAEL A. ROSAS, ADMINISTRATIVE LAW JUDGE

On May 24, 2001, the Federal Maritime Commission (Commission) commenced a non-adjudicatory fact finding investigation into the practices of Port Everglades Department/Broward County Board of County Commissioners and the CPA relative to exclusive tug arrangements in their respective ports.[4] On February 25, 2002, the Commission issued an Order of Investigation

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[3] This decision will become the decision of the Commission m the absence of review (Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227).

[4] See Order of Investigation, *Exclusive Tug Arrangements in Florida Ports,* Fact Finding Investigation No. 24 (served May 24, 2001).

commencing this proceeding and an Order to Show Cause commencing a separate proceeding (Docket No. 02-02) to determine whether CPA violated Section 1 O(b)(10) of the 1984 Act, 46 U.S.C. app.§1709(b)(10) by unreasonably refusing to deal or negotiate.'

The first prehearing conference was held in this matter on March 14, 2002 and attended by counsel for BOE and CPA, as well as counsel for two potential intervenors, Seabulk and Tugz, and the President of another potential intervenor, Petchem. The latter three were conferred intervenor status, without objection. However, the parties indicated discussion of a possible settlement and requested a stay of discovery to facilitate the process. The report of the conference stated, in pertinent part, that

> [a]t the outset, counsel for the BOE informed the undersigned that counsel for the parties and representatives of the potential intervenors met immediately prior to the prehearing conference to discuss a possible resolution of this proceeding. No one in attendance disputed the representation that those discussions were extremely productive and warranted further discussions among the parties. Counsel for the parties further represented that a potential resolution would take place in two steps. The first step would occur on April 17, 2002 and, if accomplished successfully, would take the parties to step two on May 15, 2002. As indicated in the Order of Investigation and Hearing which initiated this proceeding, Port Canaveral is governed by a Board of Commissioners and it is that body's concurrence that would be required for an amicable resolution of this proceeding. It was noted by counsel for Port Canaveral that all involved would be dedicating themselves over the next two months toward accomplishing such a resolution. Accordingly, everyone present, except for Tugz's counsel, requested that all prehearing discovery be stayed until May 2002. . . After further discussion, I ruled that all discovery proceedings are stayed until further notice."[6]

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[5] *Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate,* Docket No. 02-02.

[6] *Report of Discussion at Discovery Conference and Rulings, served* March 15, 2002

Those settlement discussions culminated in an agreement in which CPA, during May 2002, issued a "Request for Qualifications for an Additional Tug Services Franchise" (RFQ). The RFQ contained the minimum criteria to be met by a second franchisee for commercial tug services in the port and was sent to both Petchem and Tugz, and published in a local Florida newspaper. No responses were received, but both Petchem and Tugz explained to CPA that they thought the criteria were excessive and made no economic or operational sense. Another prehearing conference was held on June 20, 2002, counsel reported that settlement discussions had not succeeded and I immediately removed the stay and ordered discovery to proceed.

Discovery was conducted between June and October 2002. On August 16, 2002, I granted Tugz' motion to be dismissed from the proceeding.[7] Written testimony was submitted by the parties on or about November 30, 2002 and cross-examination of designated witnesses was conducted in Washington, D.C. on December 18 and 19, 2002 and January 2, 3 and 17, 2003, and in Titusville, Florida from January 6 through 10, 2003.

FINDINGS OF FACT[8]

A. *The Parties*

BFF7. CPA receives its authority from the State of Florida under an enabling statute, Chapter 28922, Laws of Florida, Special Acts of 1953, as Amended. It is a body politic, with taxing

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[7] I have not inferred Tugz's request to be dismissed from the case to indicate a newfound support for the CPA tug franchise system. Correspondence from Tugz explaining its request indicated that it was concerned about divulging proprietary mformation about its Port Everglades operations m this litigation to Seabulk, its competitor at that port.

[8] The findings of facts have been adopted from among those proposed by the parties, correlate to then numerical designations and are preceded by the followmg references: "BFF" for BOE's proposed fmdmgs, "CFF" for CPA's proposed findings; and "PFF" for Petchem's proposed findmgs. None of Seabulk's proposed findings were adopted, as they were a duplication of those proposed by CPA or contained legal conclusions.

and eminent domain powers, and is governed by a board of five Commissioners elected from five separate port districts.

CFF1. CPA is the governmental body with jurisdiction over Port Canaveral. It is independent of the Brevard County Commission and area municipalities, receiving its operational authority from the State of Florida. It is an arm of the State of Florida. The Authority is headed by five elected Commissioners who oversee the fiscal, regulatory, and operational policies of the Port. The Authority has a staff of approximately 158 people who carry out fiscal, regulatory, and operational policies of the Port, headed by an Executive Director, Malcolm McLouth.

BFF2. CPA is a marine terminal operator as that term is defined in section 3 (14) of the Shipping Act of 1984 (1984 Act). CPA is listed in the Federal Maritime Commission's (FMC) FMC- 1 database under Organization No. 0 112 16.

BFF2. Intervenor Petchem is a privately held corporation with its principal offices at 16 Chapel Street, Norwalk, CT 06850. Its president and founder is Anthony Savas. Petchem has been engaged in the tug and towing business since January 1, 1984, when it commenced operations under a contract to perform such services for military vessels in Port Canaveral.

BFF4. Intervenor Seabulk is a Delaware corporation, whose wholly-owned subsidiary, Seabulk Towing, Inc., is the sole franchisee for tug and towing services in Port Canaveral. Prior to March 13, 2001, Seabulk was known as Hvide Marine, Inc. (Hvide).

BFF5. Intervenor Tugz is a subsidiary of the Great Lakes Towing Company and Admiral Towing and Barge Company, members of the Great Lakes Group. Tugz filed an application for a franchise to perform tug and towing services in Port Canaveral on June 13, 2000. Tugz' motion to withdraw as a party to this proceeding was granted on August 16, 2002.

BFF6. BOE was named as a party to this proceeding by the Order of Investigation and Hearing.

B. Organization, Characteristics, and Operations of CPA

BFF8. CPA is authorized to grant franchises for numerous services in the port. While tug and towing services are not specifically listed among those services, Florida courts have found that CPA has the authority to grant non-exclusive franchises for tug and towing services. Despite the numerous services for which franchises are authorized, tug services are the only type of services franchised by CPA.

BFF9. CPA is run on a daily basis by an Executive Director, who is the chief executive officer and chief financial officer, reporting directly to the Board of Commissioners. The executive Director is assisted by a professional staff headed by a director and deputy directors in charge of each department.

CFF5. The Executive Director has discretion to place an item on the Commissioners' agenda.

CFF4. Any of the five Commissioners may request that an item be placed on the public agenda.

BFF10. In 1979, CPA's operating revenue was less than $1 million. In 2000, CPA's operating revenue was over $32 million. CPA has been financially self sufficient since 1986, funding all of its operations and capital improvements from user fees, tax free bonds and grants without imposing or using ad valorem taxes.

BFF11. Cargo handled at Port Canaveral has grown from about 2 million tons per year in the early 1980s to approximately 4 million tons in the year 2000. Much of this cargo moves in the foreign commerce of the United States.

BFF12. The cruise industry at Port Canaveral has grown more dramatically than cargo, and now accounts for about 70 per cent of CPA's revenues. By July 2000, Port Canaveral became the second busiest cruise port in the world based on the number of passengers using multi-day cruises. Many of these cruises are to foreign locations in the Caribbean.

CFF7. Port Canaveral is a deepwater port on the East Coast of Florida, with six cruise terminals, two liquid bulk facilities, and nine dry cargo berths. Primary cargoes handled at the Port are salt, orange juice, lumber, cement, newsprint, and seafood.

BFF13. Port Canaveral is a small port, geographically, with a relatively narrow (400 ft.) entrance channel and three turning basins off the main east-west channel. Total distance from the sea-buoy to the western end of the channel is 3.5 miles.

BFF14. There are three basins in the port. The Trident Basin, operated and controlled entirely by the U.S. Navy in support of submarine and surface ship operations. The West Turning Basin has a 1500 ft. turning diameter and is used primarily for large cruise vessels. The Middle Basin has a 1200 ft. turning diameter is used primarily for maneuvering cargo vessels and smaller cruise/gambling vessels.

BFF15. CPA owns all of the land surrounding the waters of the port, except for the portion surrounding the Trident Basin, and the eastern side of the Middle Basin, which is owned by the U.S. Government. CPA leases some of its land to private tenants, and retains control of other land and berths referred to by the former Executive Director as "commercial piers" or the "commercial

operation of the Port." Various "bulkheads" throughout the Port, whether or not leased, are not included in the "commercial operations of the Port" and tug services at those locations are not restricted by the tug franchise.

CFF8. Port Canaveral is contiguous with Cape Canaveral Air Station, and adjacent to the Kennedy Space Center. Its narrow entrance channel is bounded to the north by a Trident Submarine Turning Basin and a Naval Ordnance Test Unit Wharf. The Port and the U.S. Navy have entered into a Memorandum of Understanding concerning ship movement priorities at the Port.

BFF16. Malcolm E. McLouth has been the Executive Director of Canaveral Port Authority officially since July 1, 2000. Prior to that, he was CPA's Executive Director of Business Development for about three and a half years. Mr. McLouth was a CPA Commissioner from 1967 to 1996, and employed most of that time as a professional engineer for a private firm. The job of CPA Commissioner is a part time job, with the Commissioners meeting regularly once a month. Special meetings are rare.

BFF17. Charles M. Rowland served as the Executive Director of CPA from March 1980 to June 30, 2000. He and Mr. McLouth switched jobs on May 1, 2000, two months prior to Mr. McLouth's official assumption of the duties of Executive Director. Prior to being employed by CPA, Mr. Rowland served in the U.S. Navy for over 25 years. His last duty assignment was as Commanding Officer, Military Sealift Command Office, Port Canaveral.

BFF18. Lauren Kotas has been the Director of Marketing and Trade Development for CPA since 1996 and is responsible for formulating cargo traffic projections for Port Canaveral. CPA does not specifically market tug services in the Port, but simply refers potential users to Seabulk. Ms. Kotas does not know the capabilities of the tug boats serving vessels in Port Canaveral.'

BFF19. Captain William Bancroft began working for CPA in May 1990 as the Deputy Executive Director and Director of Human Resources. Capt. Bancroft is currently the Deputy Executive Director for Operations and Administration. As such, he is responsible for ensuring that all operational matters involving the support of both passenger and cargo shipping are carried out in an effective and efficient manner. This position also serves as the Director of Human Resources and the Director of Real Estate and Tenant Relations. Capt. Bancroft reports directly to the Executive Director for all matters under his cognizance.

BFF20. Prior to working for CPA, Capt. Bancroft served as the Commanding Officer, Naval Ordinance Test Unit ("NOTU") in Port Canaveral from 1983 to 1990. Capt. Bancroft retired from the Navy, after 30 years of service, on March 1, 1990.

C. *Corporate History of Seabulk Towing, Inc.*

BFF21. Hvide, a Florida corporation, was a family-owned business until August 1996, when it issued an initial public offering. Hvide Marine Towing, Inc. was a wholly owned subsidiary of Hvide.

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[9] Contrary to BOE's assertions, Ms. Kotas did not indicate a lack of knowledge of the tug equipment used, nor did she state that mformation regarding the capabılıtıes of tug boats in Port Canaveral were not important to her job.

BFF22. Hvide filed for Chapter 11 protection from creditors in federal bankruptcy court on September 9, 1999, and emerged from Chapter 11 bankruptcy on December 15, 1999, as a Delaware corporation, with new owners.

BFF23. Loomis, Sayles & Company, L.P. ("Loomis") owned a majority interest in Hvide after the company's bankruptcy reorganization.

BFF24. During the summer and autumn of 2000, attorneys for Hvide corresponded with the U.S. Coast Guard's National Vessel Documentation Center concerning an impending transfer of ownership of Loomis to a non-citizen, the proposed establishment of Loomis, Sayles Voting, Inc., and the effect of those developments upon the coastwise eligibility of Hvide's vessels, including tugs. [10]

BFF25. On October 13, 2000, the U.S. Coast Guard's National Vessel Documentation Center approved the steps proposed by Hvide to retain eligibility to engage in coastwise trade contingent upon Hvide filing a certification, supported by an affidavit, detailing the relationship between Loomis, Sayles Voting, Inc. and Loomis, and provided that the transaction is consummated in strict accordance with the proposals submitted.

BFF26. Hvide Marine Inc. changed its name to Seabulk International, Inc. effective March 20, 2001.

BFF27. In 2002, the shares of Seabulk beneficially owned by Loomis were transferred to

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[10] CPA objected to proposed fmdmgs relating to Seabulk's need, upon its corporate reorganization, for certain approvals from the United States Coast Guard, on the ground that none of these matters had an impact on Seabulk's ability to provide tug services at the Port. CPA Reply at 22. Nevertheless, the proposed findings are relevant on the issue of CPA's consideration of Seabulk's internal changes and their potential impact on its ability to provide tug services at the Port.

affiliates of CSFB Private Equity and the Carlyle Group. On August 16, 2002, the U.S. Coast Guard's National Vessel Documentation Center approved Seabulk's continued eligibility under section 27 of the Merchant Marine Act, 1920, 46 U.S.C. app. § 883 ("Jones Act") to document and operate vessels in coastwise trade under this proposed new ownership.

D. History of Tug Services in Port Canaveral

BFF28. Hvide began providing tug services in Port Canaveral in 1958 under the name "Port Everglades Towing" and, subsequently "Port Canaveral Towing." Hvide was the sole provider of both military and commercial tug services in the port from 1958 until January 1, 1984. Military tug services were performed under a contract restricted by a small business set-aside program.

BFF29. On January 8, 1975, CPA and "Port Everglades Towing, Inc." entered into a franchise agreement ("1975 Franchise"). The 1975 Franchise: (a) provided for a term of ten years; (b) continued from year to year thereafter until terminated by either party with sixty days written notice or upon default uncorrected after thirty days written notice; (c) required the franchisee to operate and maintain "two (2) or more modem harbor tug boats equipped with tire fighting apparatus;" (d) required the franchisee to "provide, operate and maintain adequate, efficient and satisfactory tug assistance and fire-fighting service to meet all of the requirements in the operation of Port Canaveral, Florida, as determined by [CPA];" (e)committed CPA to not grant another tug franchise "without first having public hearing showing a convenience and necessity therefore (sic) as determined solely by [CPA];" and (f) provided for an annual franchise fee of $250.

PFF25. CPA viewed the 1975 Franchise Agreement as a means of inducing a commitment from Seabulk to continued operations in the port.

PFF26. The franchise was renewed annually after the expiration of the 1 O-year term of the 1975 Franchise Agreement, based upon no standard set of procedures or formal process.

PFF27. The 1975 Franchise Agreement does not contain the words "non-exclusive."

BFF30. There is not, and never has been, a corporation named "Port Everglades Towing, Inc."

BFF3 1. The earliest document in the record containing the term "convenience and necessity" is the 1975 Franchise. The statute creating CPA authorizes CPA to issue franchises which are "necessary, feasible and advantageous." In 1985, a Florida court interpreted CPA's authority to permit it to issue non-exclusive tug franchises which are "necessary and convenient."

BFF32. By 1983, Hvide had become too large to qualify as a small business and, in December 1983, the U.S. Government contract to perform tug and towing services for military vessels calling at Port Canaveral was awarded to Petchem from among eight to twelve bidders.

BFF33. After losing the military contract to Petchem, Hvide continued to provide commercial tug services under its 1975 Franchise. The 1975 Franchise was renewed each year by CPA after the initial ten year term until April 18, 2001, when it was replaced by an Amended and Restated Franchise between CPA and Seabulk. No documentation was required to be submitted by Hvide as part of the annual renewal process, which was normally handled as part of a consent agenda, utilized by CPA to make a single approval for a number of items without having to take individual votes on each item.

PFF32. Petchem's military contract was for an initial term of three years and was competitively bid every three to five years thereafter.

PFF33. Petchem performed the military work for 16 years, receiving high ratings and letters of commendation from the Canaveral Pilots Association and United States Navy, among others.

BFF34. Petchem began tug and towing operations on January 1, 1984, under its contract with the U.S. Government to service military vessels calling at Port Canaveral. Petchem provided service to military vessels in Port Canaveral under five successive contracts from 1984 until December 1999, except for a six month period in the late 1980s during which the military used Navy tugs. Those contracts required, among other things, that Petchem provide two tugs, available 24 hours per day, seven days per week.

PFF36. Upon learning that the Navy was reevaluating its tug service contract with Petchem, Mr. Bancroft, then-Deputy Executive Director of the CPA, contacted officials at NOTU and MSC in April 1999 requesting information as to the military's upcoming contract for tug services in Port Canaveral, including specifications and potential awardees, and expressing his view that the commercial and military work should be performed by a single tug provider under a single contract. Mr. Bancroft also expressed his opposition to and distaste for small business set-asides to the military officials making the decision whether to renew Petchem's military contract for tug services in Port Canaveral.

PFF37. Following Mr. Bancroft's initial contacts with the military, the MSC contacted Mr. Charles Rowland, then-Executive Director of the CPA, in April 1999 requesting his opinion regarding the upcoming renewal by the military of its tug services contract.

PFF38. Mr. Rowland expressed his opinion that the military could get the level of service it needed at a lower cost by relying on the commercial franchisee in the Port under commercial rates in the posted tariff.

PFF39. Mr. Rowland made this recommendation knowing that the only company offering commercial tug services under the tariff was Seabulk.

PFF40. Petchem became aware of the CPA's actions in this regard and sent a letter to Mr. Rowland dated June 1, 1999 notifying him that Mr. Bancroft was "aggressively soliciting" the military in an effort to "return the port to a one tugboat company operation as it had been prior to 1984." Petchem also expressed an interest in competing for such a sole commercial tug franchise if this in fact was the CPA's goal.

PFF4 1. After receiving no reply from the CPA, Petchem sent another letter to Mr. Rowland dated July 10, 1999, stating Petchem's information that Mr. Rowland had also communicated with the military regarding returning the port to a one tugboat company operation.

PFF42. Upon learning that the U.S. Navy was reviewing its tug procurement policies in early 1999, Canaveral Pilots Association President John Boltz wrote a letter dated July 9, 1999, to Captain Harold Sheffield, Commanding Officer of NOTU, with copies to CPA, Seabulk and Petchem, stating that:

> The Canaveral Pilots Association is satisfied with the present tugboat arrangements in Port Canaveral. . . . [P]resent services in the harbor do provide the availability of five tugs of which four are available with one-hour notice. . . . Any downgrading from providing this combination of four manned tugs in the harbor with a fifth tug available will result in a loss of safety and efficiency within the Port. . . . I am concerned that if one company controls the service to both the Navy and the Commercial Sector that safety and efficiency will be sacrificed.

PFF43. Mr. Richard Decker, then-Vice President of Towing Operations at Hvide Marine Towing, responded to Mr. Boltz in a letter dated July 20, 1999, noting that Hvide was "considering bidding on the Navy contract at Port Canaveral" and that Mr. Boltz letter "may very well have provided a disservice to the Navy, Port Canaveral and our company."

PFF44. Mr. Bancroft testified that he contacted Mr. Boltz via telephone sometime after the July 9, 1999 letter was sent, asking him to clarify his concern that "if one company controls the service to both the Navy and the Commercial Sector that safety and efficiency will be sacrificed." Mr. Bancroft stated that he spoke with Mr. Boltz on numerous occasions following Mr. Boltz's July 9, 1999 letter.

PFF45. Mr. Boltz also testified that while he did speak with Mr. Bancroft shortly after sending the July 9, 1999 letter, Mr. Bancroft did not ask him to elaborate or clarify his letter at that time. Mr. Boltz testified that Mr. Bancroft specifically asked for a clarification of his July 9, 1999 letter shortly before January 10, 2000, at which time Mr. Boltz responded with the January 10, 2000 letter "fairly quickly."

PFF46. In September 1999, Hvide Marine, the predecessor to Seabulk International, tiled for Chapter 11 protection from its creditors in federal bankruptcy court. [R-00031; R-19038; R-16098; R-15003.1 Mr. Ludt testified that shortly thereafter, in October 1999, the seven top executives at Seabulk Towing resigned, concerned that the company would not make it financially.

PFF47. On December 14, 1999, Petchem's military contract to perform tug and towing service in Port Canaveral was terminated. From this point forward, tug support activity in the Port for military vessels was procured for each military vessel call.

BFF35. On December 15, 1983, having been awarded the military contract, Petchem applied to CPA for a commercial towing franchise. That application was denied by CPA on February 16, 1984, on a motion by then-Commissioner McLouth.[11]

PFF34. Petchem and Seabulk co-existed in the Port from 1983 until 1999, with Petchem performing the military work and Seabulk performing the commercial work. On occasion, each company would assist the other when conditions required additional power or tugs.

PFF35. There were advantages to having Petchem in the port, especially in emergency situations, as up to four tugs were needed at times.

BFF36. Subsequent to termination of the military tug contract with Petchem on December 14, 1999, the military obtained tug services for military vessels calling at Port Canaveral on a vessel-by-vessel basis, with both Seabulk and Petchem competing to provide such tug services.

BFF37. On December 16, 1999, Petchem again expressed interest in applying for a franchise to perform commercial tug and towing services in Port Canaveral and inquired as to the process to be followed.

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[11] CPA objected to this proposed finding as "nothing more than another gratuitous and oblique attack on the integrity of a public servant who has devoted a significant portion of his professional life to the betterment of Port Canaveral." CPA Reply at 23. However, the proposed fmdmg is relevant for the proposition that Malcolm McLouth, CPA's current Executive Director, has been familiar with Petchem's service m the Port since at least 1984 through the date that CPA considered Petchem's second application in July 2000. BOE Reply at 56.

PFF49. Charles Rowland, then-Executive Director of the CPA, responded in a letter on December 21, 1999, stating that the CPA Board of Commissioners would consider the tug franchise application process at its next meeting on January 19, 2000, based on the recommendation of the CPA staff. However, even before Petchem submitted its letter expressing interest in obtaining a tug franchise, Mr. Rowland had already concluded that the business in the port would not support another tug provider.

PFF50. Petchem responded on December 29, 1999, to Mr. Rowland's letter of December 21, 1999, restated its interest in obtaining a tug franchise for commercial work in Port Canaveral, and set forth in more detail specific reasons for its interest. In addition, the letter emphasized that Petchem's objective in applying was to obtain either an additional commercial tug franchise or sole rights to commercial traffic.

PFF51. At the time Petchem submitted its initial letter of interest, the Port had no published standards, guidelines or procedures for considering applications to provide commercial tug services. This absence of a formal process continues to this day. The phrase "convenience and necessity" is a term that is stated in the CPA/Seabulk franchise agreement, but does not appear in state or federal statutes and is not an element of any other agreement, license, lease or permit negotiated or issued by the CPA to other users of the Port.

PFF54. Shortly after the late-December 1999 correspondence between Petchem and the CPA regarding the former's interest in obtaining a tug franchise, Seabulk learned of Petchem's interest and arranged a meeting with the CPA.

PFF55. On January 4, 2000, William Ludt, then-President of Seabulk Towing, met with Messrs. Rowland and Bancroft of the CPA.

PFF56. On January 7, 2000, Mr. Ludt sent a letter to Mr. Rowland thanking him for the January 4, 2000 meeting and expressing extreme importance in being "kept informed of all activities relative to Towing Franchising at Port Canaveral. Specifically, we request that we be officially notified in the event that Petchem, or any other entity, formally applies for a Towing Franchise at Port Canaveral."

PFF57. Mr. Ludt also sent a letter to Mr. Bancroft on January 7, 2000, similarly expressing gratitude for the meeting on January 4, 2000, and requesting information relating to vessel calls in Port Canaveral in the past, as well as projected calls.

PFF58. Mr. Ludt testified that he initiated a meeting with Canaveral Pilots Association President John Boltz and others within a day of the meeting between Mr. Ludt and the CPA in order to discuss the Canaveral Pilots Association letter dated July 9, 1999 expressing the pilots' opinion that there was an advantage to having two tugboat companies in the port. Mr. Ludt also recounted that Mr. Boltz asked Seabulk if it would be willing to bring in a tractor tug because of pilot concerns about the *Sovereign of the* Seas coming into the port.

PFF59. Mr. Boltz, however, was unaware that the tractor tug was deployed to Port Canaveral in response to the expected arrival of the *Sovereign of the Seas.* Mr. Boltz was "surprised" upon seeing the arrival of the tractor tug in Port Canaveral. The *Sovereign of the Seas* utilized the tractor tug on only three occasions in 2000. Mr. Rowland has testified that "normal tugs can get [the *Sovereign of the* Sea] in and out; not handily, but they can get it in and out."

PFF61. Mr. Bancroft contacted Mr. Boltz in early January 2000 and asked him to clarify his letter to Captain Sheffield, USN, Commanding Officer, NOTU, dated July 9, 1999.

PFF62. Mr. Boltz's thereafter sent a letter to Mr. Bancroft dated January 10, 2000, noting that: "Referring to the attached letter, I do not believe that the issue of 'one or two' companies is at the heart of what Port Canaveral needs as pertain to tug service. I do believe that one company can provide better service to Port Canaveral than what we have today. In fact, it is an issue of equipment and availability of tugboat crews rather than whether there are one or two tugboat companies in Port Canaveral."

PFF63. Seabulk became aware sometime before the January 4, 2000 meeting with CPA that Petchem had expressed an interest in obtaining a tug franchise to perform commercial tug services in Port Canaveral.

PFF64. After obtaining this information, Seabulk deployed the tractor tug Eagle *I* to Port Canaveral in February 2000.

PFF65. Seabulk did not perform a study or analysis before bringing the tractor tug into Port Canaveral.

BFF38. On January 19, 2000, CPA's Commissioners were informed by the CPA staff that three options w ere a vailable for responding to P etchem's i nterest in applying for a franchise: (a) comply with the 1975 Franchise and hold a hearing of convenience and necessity; (b) award a second franchise; or (c) put the tug services out for bid. The Commissioners directed the staff to investigate the three options and make a recommendation at the April 2000 CPA Commission meeting.

BFF39. Sometime in February 2000, Hvide introduced the tractor tug *Eagle* to Port Canaveral. This was the first tractor tug ever put into regular use in the port and a significantly more capable and expensive tugboat than the single screw tugs which Hvide had used for many years in the port. With the addition of the *Eagle,* Hvide had four tugs in the port, two manned full time, and two on standby, that could be manned on about 12 hours notice. There was no requirement for a tractor tug, or for a fourth tug, in the 1975 Franchise that existed at that time.

PFF60. Mr. Brent Dibner, expert witness for Seabulk, stated subsequently at the CPA Commission's July 21, 2000 meeting of convenience and necessity that "[t]o put four million dollar tractor tugs into a one million dollar a year revenue stream makes absolutely no sense. The going charter hire rate for just the boat without crew of Z powered tugs, tractor tugs, today is over $2,000 a day. That's $750,000. That's the going rate."

PFF66. John Arnold, expert witness for the CPA, testified that the tractor tug was deployed to Port Canaveral at that particular time to "improve the perceived level of service they were providing, which would provide protection, you know, against a new entrant. I think there are a number of competitive pressures for them to bring in a tractor tug when no one was specifically asking for it. . . . [Seabulk] tried to raise the perceived level of quality of what they were offering as a protection against competition, potential competition."

BFF40. On April 19, 2000, CPA's Commissioners received a recommendation from staff to hold a hearing of convenience and necessity on Petchem's application, in accord with their obligations under the 1975 Hvide Franchise, and determined to hold that hearing on July 2 1, 2000.

BFF41. On June 13, 2000, Tugz filed its application for a tug and towing franchise with CPA. Because CPA had no guidelines for such applications, Tugz patterned its application after the extensive guidelines published by Broward County (Port Everglades), Florida. *DeSimone Exhibit 3, Bates R9031-9032 and R9125.* However, at the request of Petchem that its application be fully considered by the CPA before it considered any other applications, CPA's Commissioners, at a meeting on July 19, 2000, denied Tugz's request that its application be considered at the hearing of convenience and necessity scheduled for July 21, 2000.[12] However, no hearing was ever held on Tugz's application.

PFF74. Mr. Savas of Petchem raised several issues in Petchem's application and through his oral presentation at the hearing, including: a description of Petchem's equipment; letters of support for Petchem's application from port users; information concerning Seabulk's past performance in the Port; Seabulk's recent bankruptcy; possible debarment or suspension from servicing military contracts; private lawsuits against the company; Seabulk's first quarter losses for that year; and other information about Seabulk that Petchem deemed relevant to the CPA Commission's decision process.

PFF75. Eugene Sweeney, then-President of Hvide Marine, Inc., appeared after Mr. Savas and stated that he was not aware of Mr. Savas's reference to difficulties that might affect Hvide's ability to perform military contracts in the future.

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[12] The proposed finding was modified to reflect CPA's valid objection that it decided not to take action on Tugz's application after Petchem requested that its application processed before any others were considered. CPA Reply at 23.

PFF79. Mr. Bancroft recommended against awarding a tug franchise to Petchem at the July 21, 2000 hearing of convenience and necessity, but conceded that he "never c onsidered" Petchem's application as a possible replacement to Seabulk's franchisee. In formulating his recommendation to the CPA Commission to deny Petchem's application, Mr. Bancroft testified that he did not look at the equipment being offered by Petchem in its application because it was not important. Mr. Bancroft also testified that he did not consider Seabulk's first quarter results for the year 2000 that Petchem included in its application because "[t]hose are Mr. Savas's opinion of Hvide, and I didn't consider that important, nor did I consider it pertinent to the application." Although Mr. Bancroft was "responsible under the Executive Director to advise the Port Commissioners on [Petchem's] application," Mr. Bancroft did not inform the CPA Commissioners of the issues listed in Petchem's application: the Chapter 11 bankruptcy filing by Hvide; control of Seabulk by third-party interests; multiple court complaints filed against Hvide; and Hvide's guilty plea to a felony entered on June 6, 2000.

PFF80. Commissioners of the Port reviewed Petchem's application and supporting materials for approximately ten minutes before making their decision.

BFF42. On July 21, 2000, Petchem's application was denied by unanimous vote of CPA's Commissioners, with the rationale that there was insufficient business in the port to support two tug operators and that they were pleased with the service and equipment, particularly the tractor tug, provided by Hvide. Repeated concerns were expressed over whether "destructive competition" could or would occur if two tug companies were allowed to operate in the port.

BFF43. At that same meeting, there was discussion among the CPA's Commissioners that the1975 Franchise should be revisited to update requirements for tug sizes and descriptions to assure some level of service.

PFF85. After the CPA's denial of its tug franchise application, Petchem continued to offer tug services to the military on a move-by-move basis in competition with Seabulk.

BFF44. However, without access to the commercial towing market, Petchem was at a disadvantage in competing for military vessel movements and removed both of its tugs from Port Canaveral by December 2000. Thereafter, Hvide resumed its pre- 1984 status as the sole provider of military and commercial tug and towing services at Port Canaveral.[13]

BFF45. On April 18, 2001, CPA and Seabulk (Hvide's name was changed on March 1, 2001) entered into an Amended and Restated Franchise Agreement ("2001 Franchise") which, as pertinent to this proceeding: (a) provides for a term of ten years; (b) continues from year to year thereafter until terminated by either party with sixty days written notice or upon default uncorrected after thirty days written notice; (c) requires the franchisee to operate tugboat and towing services continuously on a twenty-four hour per day basis and to "provide 2 operational tugs equipped with fire-fighting apparatus, one being a tractor tug (24-hrs a day) for purposes of customer service, with a 3rd & 4" tug on standby;" (d) requires the franchisee to "provide, operate and maintain adequate, efficient and satisfactory tug assistance and tire-fighting service to meet all of the requirements in the operation of Port Canaveral, Florida, as determined by [CPA];" (e) commits CPA to not grant another tug franchise "without first having public hearing showing a convenience and necessity

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[13] CPA objected to this fmdmg on the ground that Petchem's departure from Port Canaveral was merely a business decision and was not the result of any action by CPA. However, the evidence clearly demonstrates that CPA repeatedly attempted to influence the Navy to abandon its contract with Petchem and, once that was accomplished, Petchem could not effectively compete with Seabulk for the military work on a piecemeal basis.

therefore (sic) as determined solely by [CPA];" (f) provides for an annual franchise fee of **$1000;** (g) describes this franchise as "Non-Exclusive;" and (h) requires franchisee to provide a written description no less than annually detailing tugboat characteristics, crew requirements, and firefighting training exercises to be performed, which written description "shall be the binding obligation of the Franchisee at a minimum."

BFF46. The main differences between the 2001 Franchise and the 1975 Franchise are:

(1) the number of tugs is increased from two to four (two on standby);

(2) a requirement for continuous 24 hour per day service;

(3) a requirement for a full time tractor tug;

(4) a requirement for tug, crew and firefighting specifications to be provided by Seabulk;

(5) a change in name to "Non-Exclusive Franchise from "franchise;" and

(6) the 2001 Franchise was issued to a duly created corporation.[14]

BFF47. On September 182001, Tugz sent an updated application to CPA and requested that a formal hearing be scheduled to consider its application for a non-exclusive tug and towing franchise.

BFF48. By letter dated September 25, 2001, the CPA Executive Director responded to Tugz by stating, among other things, that Tugz "does not have an application pending" and that he "will

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[14] CPA objected to BOE's possible implication that the 1975 franchise agreement was void because the franchisee was misnamed. The undisputed facts indicate that the entity named on the 1975 franchise agreement was an unincorporated business and not a formal corporation. However, it would be misleadmg to describe the 1975 franchisee as something other than "legitimate," since the agreement was not void simply because it listed the franchisee as Port Everglades Towing, Inc., the name under which Hvide initially did business at Port Canaveral The agreement might have been voidable while it was extant, but that was an option not taken by CPA. Nevertheless, the distinction is a relevant one on the issue of CPA's knowledge of ownership changes and its consideration of the potential impact on the franchisee's ability to provide tug services at the Port.

not be placing Tugz's application on the Port Authority's meeting agenda." No further action has been taken by CPA on Tugz's application or updated application."

BFF49. In May 2002, CPA issued a "Request for Qualifications for an Additional Tug Services Franchise" which set forth minimum criteria to be met by a second franchisee for commercial tug services in the port. This Request was sent to both Petchem and Tugz on May 17, 2000, and published in a local newspaper on May 20, 2002. No applications were received pursuant to this notice, but both Petchem and Tugz explained to CPA that they thought the criteria were excessive and, when combined with the requirements imposed upon Seabulk, made no economic or operational sense. Seabulk also advised CPA that it may remove equipment or abandon Port Canaveral if a second franchise were granted pursuant to the criteria in the May 2002 Request for Qualifications.

E. The Market for Tug Services in Port Canaveral

BFF50. In 1983, the last full year before CPA denied Petchem's first application, there were 188 tug assisted commercial vessel moves in Port Canaveral. In 1999, the last full year before CPA denied Petchem's second application, there were 1445 tug assisted commercial vessel moves in Port Canaveral (749 cruise vessels and 696 cargo vessels).

BFF51. In 1984, the year in which CPA denied Petchem's first application, Hvide had two single screw tugboats in Port Canaveral. In 2000, the year in which CPA denied Petchem's second application, Hvide had three single screw tugs and a tractor tug in Port Canaveral.

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[15] CPA responded to this finding by emphasizing the significant role of its Executive Director in the process and essentially stating that he was responsible for determming whether the Commission would be asked to convene a hearing of convenience and necessity.

BFF52. Demand for commercial tug services in Port Canaveral grew significantly from the early1980s to a peak in the late 1990s, when newer, larger cruise vessels with thrusters, and other sophisticated maneuvering devices, began to replace older, smaller cruise ships which regularly required tug assistance. The most dramatic decrease in demand for tug services occurred in the fall of 2000, when Premier Cruise Lines ceased operations and Sterling Casino Lines replaced an older vessel with a newer one with thrusters.

BFF53. While demand for commercial tug services declined from 1999 to 2001, particularly in the cruise ship sector, demand rebounded somewhat for both cargo and cruise vessels in 2002.[16] In addition, demand for military tug services, which must be considered part of the Port Canaveral market, has increased significantly from 357 tug moves during twelve months of 2001, to 320 tug moves during the first seven months of 2002.[17]

BFF54. In July 2000, when CPA held its hearing of convenience and necessity on Petchem's application, the dramatic decline in tug use by cruise vessels had not begun.

BFF55. Hvide had the following tug equipment in Port Canaveral in July 2000[18]:

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[16] According to Arnold's Table 5, the 2002 data for tug assisted vessel moves at Port Canaveral indicated an annual increase of 1% for cruise vessels and 10% for cargo vessels.

[17] Arnold's Table 6 included data of the demand for military tug services. This is useful information, as the presiding judge has determined that the relevant market consists of commercial and military vessel moves. On an annualized basis, tug assisted military vessel moves increased from 357 m 2001 to 549 (extrapolated from 320 moves over 7 months) in 2002, or 53.8%. Arnold's Table 6 reflects only Hvide's military tug moves and not those performed by Petchem in 1999 or 2000. Therefore, the table cannot be relied upon m arriving at any conclusions about the demand for military tug services in those years.

[18] It appears that Hvide may have had two other tugs in Port Canaveral during some part of 2000, which have since been removed. The four tugs listed above were, and still are, those m regular use m the port since about March 2000 (i.e., two full time, and two on standby).

Tug Name	Type	Year Built/Rebuilt	Horsepower/Bollard Pull
Brevard	Single Screw	194511983	2400/45,000
Captain Brinn	Single Screw	1960/1986	2150/53,000
Everglades	Single Screw	195611985	2150/53,000
Eagle	Tractor	1988	3200/90,000

BFF56. As part of its application, Petchem offered to provide two twin screw tugs of approximately 2000 horsepower each, which were built in 1979 and 1986, respectively, in addition to a twin screw Personnel Transfer Vessel which could be modified to provide significantly improved firefighting capability for the port. Petchem also proposed to bring in a twin screw, 3700 horsepower tug with an estimated 80,000 lbs. bollard pull ahead and 60,000 lbs. astern."

PFF9. Petchem currently owns three twin screw tugboats, as well as a personnel transfer vessel.

BFF57. In its application dated June 9, 2000, and submitted to CPA on June 13, 2000, Tugz offered to bring two or more newly constructed 4000 horsepower reverse tractor tugs into Port Canaveral with 112,000 lbs bollard pull ahead and 107,000 lbs bollard pull astern and over 90,000 lbs bollard pull in all other directions.[20]

BFF58. Of the three types of tugs offered or available at Port Canaveral, the tractor tugs are clearly superior to conventional single or twin screw tugs. They are maneuverable in all directions

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[19] CPA attacked the efficacy of Petchem's proposal by underscoring the fact that the 3700 horsepower tug proposed by Petchem in 2000 was not m existence. This is a nonissue, as there is no proof that CPA had any concerns regarding Petchem's ability to fulfill its proposal had it been awarded a franchise

[20] CPA challenges BOE's assertion that Tugz was prepared to bring in a tractor tug and contends that Petchem withdrew its offer to provide a tractor tug m 2001. However, Petchem's updated proposal in 200 1 explained that it would initially bring in two twin-screw tugs and, depending on future towing volumes, was prepared to bring in tractor tugs.

and have more power. The tractor tugs offered by Tugz were each more powerful and newer than the *Eagle*. A reverse tractor tug (Tugz's proposed equipment) has its propulsion units aft, while a "true" tractor tug *(Eagle)* has its propulsion units forward, each providing advantages in various towing configurations and circumstances.

BFF59. The single screw tugs operated by Seabulk are more powerful, but much older and less maneuverable than the twin-screw tugs operated and proposed for commercial service by Petchem. Single-screw tugs are no longer being built because there is little demand for their services.

BFF60. The equipment offered by Tugz was superior to that which Hvide has in the port.

BFF61. Petchem's twin-screw tugs were more suitable than Hvide's single-screw tugs for submarines and are very capable of handling most other vessels requiring tug services in Port Canaveral.[21]

BFF62. Petchem's service in Port Canaveral was excellent and the company and its employees were commended on various occasions by the U.S. Navy, the U.S. Coast Guard, a British Naval Vessel (*HMS Trafalgar*), CPA and Congressional officials.

PFF10. Petchem has no outstanding debt and all of Petchem's equipment is free and clear from any and all types of liens or other obligations.

PPF 13. Petchem has never been in bankruptcy nor has it ever been charged with, convicted of, or otherwise pled guilty to any criminal wrongdoing of any kind.

PFF14. Petchem has an excellent safety record and has received commendations for its work.

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[21] CPA objected to the relevance of the suitability of Petchem's tugs for servicing submarines, but the relevant market, Port Canaveral, includes commercial and military vessel traffic.

PFF16. Most of the employees with Petchem have been with the company for many years and several employees have been with the company since its inception.

PFF18. Petchem's tugs are currently working in: (1) Bangor, Washington, pursuant to a Navy contract, docking and undocking Trident class submarines; (2) Aransas, Texas, pursuant to a contract, docking and u ndocking p assenger s hips; and (3) Palm B each, F lorida, p ursuant t o a contract, docking and undocking a casino ship.

PFF 19. Petchem remains interested in providing tug service in Port Canaveral and maintains the availability of its two twin-screw tugs on a 30 days notice basis pursuant to month-to-month contracts in anticipation of the positive outcome of this proceeding.

BFF63. Canaveral is home port to several large, modem cruise ships which very rarely use *tugs.* The *Disney Wonder* and *Disney Magic* have been at the port since 1998. Between January 1, 2000, and August 24, 2002, the two ships combined had used tugs only eight times. The *Carnival Pride* has been at Port Canaveral since January 12, 2002 and has never used tugs. Royal Caribbean's *Sovereign of the Seas* has been homeported at Canaveral since early 2000 and used tugs only 3 times between January 1, 2002 and August 22, 2002.

BFF64. The onboard power available to dock and undock these large cruise ships is far in excess of all of the tug power available in Port Canaveral. For example, the *Carnival Pride* has twin azipods at the stem of the vessel that generate approximately 10,000 horsepower and can be turned in any direction. An azipod is similar to an outboard motor that can be rotated 360 degrees and, on the *Pride,* serves as the main propulsion, capable of driving the ship at least 24 knots. In addition, there are three bow thrusters on the vessel capable of generating 7,000 to 8,000 horsepower. Six

onboard generators provide electrical power for the azipod and thruster motors. Three generators are normally sufficient when entering port and docking/undocking.

BFF65. The total horsepower of all four Seabulk tugs is 9,900.

BFF66. Disney did not consider the availability of tugs when deciding upon a homeport for the *Wonder* and *Magic*. Both ships were in Port Canaveral about two years before the arrival of Hvide's tractor tug.

BFF67. The primary reason why cruise ships call at Port Canaveral is unrelated to tug services. Rather it is because there is a market for cruise services in the area.

BFF68. Ship pilots in Port Canaveral expressed concerns about the thruster capabilities of Royal Caribbean's *Sovereign of the Seas* before the ship arrived at the port, but those concerns turned out to be unfounded.

BFF69. As demonstrated by the statistics on tug use, large cruise vessels rarely need tug service. The *Carnival Pride,* for example, has embarked from Port Canaveral in 35 knot winds. The force necessary to move the *Carnival Pride* broadside in 25 knot winds is approximately 125 tons, or 250,000 pounds, far beyond the combined bollard pull capability of all of Hvide's tugs.

BFF70. If a large cruise ship needs tugs, two large tractor tugs are desirable.

BFF71. Tugz offered two or more large tractor tugs to the port in June 2000.

F. Absence of Objective Standards and Procedures

BFF72. CPA has no procedures or processes that a tug company is required or advised to follow in applying for a tug and towing franchise.

BFF73. Other than in 1975, when CPA awarded a towing franchise to Hvide, and 2001, when it awarded an amended and restated franchise to Seabulk, CPA has not made a determination

that it would be convenient and necessary for Hvide/Seabulk to maintain, renew, update or amend its tug and towing franchises.[22]

BFF74. The process by which Hvide's 1975 Franchise was renewed each year between 1985and 2001 was one of renewal on a "consent agenda" by which a number of items were approved as a group based on the recommendation of staff. No input was required from Hvide. There are no regulations governing such procedures.[23]

BFF75. The process by which the 1975 Franchise was replaced by the 2001 Franchise was private negotiations between Hvide/Seabulk and CPA resulting in an agreement that was approved at a regular meeting o f C PA Commissioners with no requirement for Seabulk to demonstrate convenience and necessity.[24]

BFF76. In 1984, Petchem's application was referred to a committee to make a recommendation to CPA's Commissioners on whether the application met the standard of convenience and necessity set forth in Hvide's 1975 Franchise.

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22 CPA asserted that, under the 1975 franchise agreement, Hvide/Seabulk was not required to demonstrate convenience and necessity for maintaining, renewing, updating or amending its tug and towmg franchises CPA is correct. In fact, CPA's enabling statute authorizes it to grant franchises which it "may determme to be necessary, feasible and advantageous[.]" Chapter 28922, Laws of Florida Special Acts of 1953, As Amended, Article IV, Section 6.

23 BOE referred to the annual approvals as "automatic" but Rowland testified that his staff would make recommendations to continue the franchise and any CPA Commissioner could have the franchise renewal moved to the regular meeting agenda.

24 CPA objected to the notion that the amended agreement was approved durmg secret negotiations. The agreement was approved at a public meetmg, but Bancroft conceded that the substance of it was developed behveen CPA and Seabulk staff prior to the public meeting.

BFF77. In 1999-2000, CPA had two Commission meetings before deciding that the appropriate procedure to follow was to conduct a hearing of convenience and necessity on Petchem's application.

PFF68. Tugz submitted an application for a tug franchise on June 13, 2000, requesting that the CPA Board of Commissioners consider its application at the Commission's meeting of convenience and necessity scheduled for July 21, 2000.

BFF78. Tugz's application was based upon the requirements and procedures promulgated by Port Everglades because CPA had no regulations or procedures governing applications for tug and towing franchises.[25]

PFF69. The Commission considered Tugz's request at its regularly-scheduled meeting on July 19, 2000.

PFF71. The CPA Commission ultimately denied Tugz's request to have its application considered at the scheduled July 21, 2000 meeting.

PFF72. On July 20, 2000, one day before the CPA Commission's scheduled meeting of convenience and necessity, Seabulk's counsel Dyer, Ellis &Joseph sent a letter to John J. Blanchard, Office of the General Counsel, United States Navy, stating that "[w]e were surprised to learn this afternoon of the Navy's intention to issue a letter tomorrow suspending Hvide Marine Incorporated ("Hvide")." [R-0041 7; R-0041 8.]

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[25] CPA objected to BOE's imputation of mismanagement by CPA for failing to have a procedure in place with respect to franchise applications. However, the failure to follow some sort of standard is clearly relevant in determining the reasonableness of CPA's actions in failing to fully consider requests by Tugz and Petchem for tug franchises.

PFF70. Petchem opposed having the Tugz application considered at the same time by CPA because it felt each franchisee or potential franchisee should have the CPA's full attention and because Petchem was concerned that Seabulk and its supporters would argue that the addition of two new tug operators would have an even more negative financial impact on Seabulk than would Petchem alone. In opposing Tugz's application being considered at the same meeting with Petchem's application, however, Petchem did not oppose subsequent, separate review of the proposal of Tugz or any other potential applicant.

G. Interpretations of the Scope of Hvide/Seabulk's Franchise Have Been Arbitrary

BFF80. International Towing and Salvage (ITS) operates salvage equipment and small tug and pusher boats in Port Canaveral. That company has attempted to provide tug services to at least three tug users in Port Canaveral and has been told by CPA's Deputy Executive Director, Captain Bancroft, that those tug services are to be performed by Hvide, the sole franchisee.[26]

BFF8 1. One of the users attempting to use the services of ITS is a scallop barge operation along the bulkhead on the South side of the harbor. Mr. Rowland, CPA's former Executive Director, testified that the tug franchise does not cover services to these barges because they dock at a bulkhead and not at a commercial pier.

BFF82. A second tug user that ITS was prohibited by CPA from serving is Coastal Tug and Barge (Coastal) which provides fuel to cruise and other vessels via barges which require tugs. Coastal had used ITS for a number of years before CPA directed that Hvide's tugs were to be used for this service. After repeated problems getting fuel to cruise ships on time because Hvide's tugs

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[26] Ryan Moore's testimony was relevant on the issue of whether carriers were free to use tugs other than Hvide/Seabulk or those owned by the carriers.

were late, Coastal began using ITS again. Shortly after a call from Captain Bancroft and a refusal by Coastal to switch back to Hvide, Mr. Barrett, Coastal's Marine Director in Port Canaveral, received direction from his supervisor in Miami to discontinue using ITS and to use Hvide's tugs.

BFF83. Coastal is now using its own tug to move its fuel barges in Port Canaveral. Captain Bancroft testified that nothing in the franchise precludes a tug user from using its own tugs.

BFF84. Mr. Rowland testified that he does not believe the franchise permits a tug user to use its own tugs for docking and undocking. Captain Bancroft then testified that the Coastal operation did not constitute "docking and undocking" and was therefore not covered by the tug franchise. Having taken that position, he could not explain why he told ITS and Coastal that ITS could not provide tug services to Coastal.

BFF85. Interpretations of the scope of Hvide/Seabulk's rights under the franchise varied between two CPA witnesses, and indicated that those rights may depend on the draft alongside the bulkhead, the size of the vessel, the location of the berth, or the commercial nature of the operation. In addition, Mr. Rowland and Captain Bancroft disagreed on the extent to which the franchisee is allowed to subcontract tug work in the port, with Mr. Rowland taking the position that subcontracting was permissible only for emergencies. Ultimately, Captain Bancroft acknowledged that the extent of anyone's rights to perform tug services in Port Canaveral is subject to interpretation, that the interpretation is "in my head," and that, "I'm going to take a look at that whole situation here after this is over, after I'm done here."

H. Ignoring Hvide's Vulnerabilities

BFF86. During 1999-2000, Hvide:

(a) tiled for bankruptcy;

(b) replaced all seven top officials in the towing division;

(c) reorganized from a Florida to a Delaware corporation;

(d) changed ownership from U.S. to foreign interests;

(e) experienced serious financial losses;

(f) created a new "section 2 citizen" corporation to retain eligibility for coastwise service;

(g) pled guilty to a felony; and

(h) negotiated an agreement to avoid suspension/debarment from government contracting, which places continuing compliance obligations on Seabulk until November 2003.[27]

BFF87. On July 2 1, 2000, when considering whether to approve Petchem's application for a tug and towing franchise, and deciding to retain Hvide as the sole franchisee, CPA was aware of many, if not most, of these facts, through the application of Petchem, information gained from Seabulk officials, and statements made at the regular CPA Commissioners' meeting on July 19, 2000.

BFF88. Hvide entered a felony plea on June 6, 2000, involving unlawful payments to a union official in Ft. Lauderdale, Florida. On July 20, 2000, Hvide's attorneys sent a letter to the US. Navy's Professional Integrity Office, Office of the General Counsel, stating, among other things, "We were surprised to learn this afternoon of the Navy's intention to issue a letter tomorrow suspending [Hvide] ."

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[27] CPA does not dispute BOE's assertions, but contends that Seabulk adequately addressed these issues and there was never an interruptron in tug service (BOE Reply at 28). When CPA states that Seabulk addressed these issues, it must be referring to the evidence that it submitted durıng this proceeding. That evidence revealed that CPA ignored any concerns about the problems faced by CPA and the ımpact that they could have on Seabulk's operations at Port Canaveral.

BFF89. At the hearing of convenience and necessity on July 21, 2000, Petchem brought many of these matters to the attention of the CPA Commissioners. The felony plea was attached to Petchem's application. Mr. Savas also testified at that hearing, with reference to the guilty plea that: "With almost certain certainty, Hvide's eligibility to bid on public contracts that is relevant to the degree of service that Port Canaveral Towing may be able to provide to both commercial and military related traffic is jeopardized."

BFF90. At that same July 2 1 hearing, Eugene Sweeney, then President of Hvide, denied any knowledge of these matters which were raised by Mr. Savas, offered to read two letters **into the** record, asked whether CPA Commissioners had any questions about Hvide's financial position and ability to do military contracting, and was told by a CPA Commissioner that such matters were not relevant to the hearing.[28]

BFF91. No further effort was made by CPA at that hearing to obtain the letters that were offered by Mr. Sweeney, or to question him, or otherwise probe into these matters. At that time, Mr. Sweeney was aware of the letter of July 20, 2000, and of subsequent developments on the morning of July 21, 2000, relating to efforts of Hvide to avoid suspension or debarment.

BFF92. On November 4, 2000, Hvide signed an *Agreement Between Hvide Marine Incorporated and the Department* of *the Navy* ("Agreement") which, among other things, commits Hvide (and its subsidiaries, divisions, and successors, etc.) to a compliance program detailed in the Agreement. Article 11 of that Agreement states:

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[28] CPA contends that information about Seabulk was not relevant at Petchem's hearing of convenience and necessity. That is incorrect. Information relating to the critical vulnerabilities of an incumbent franchisee would be relevant in determining whether it would be appropriate for CPA and carriers in Port Canaveral to have an additional tug operator available should Seabulk's operations be impacted adversely.

> Failure by Hvide to meet any of its obligations under the terms or spirit of this agreement, not cured to the reasonable satisfaction of the Navy Debarring Authority within 30 working days, or as otherwise permitted by the Navy Debarring Authority after receipt by Hvide ofwritten notice of such failure, shall constitute a cause for suspension or debarment subject to the procedures established by the Federal Acquisition Regulation and any other applicable statute or regulation.

BFF93. Between July 21, 2000 and April 18, 2001, CPA negotiated and signed the 2001 Franchise with Seabulk. As of January 10, 2003, CPA's Executive Director had never seen the letter of June 20, 2000, from Hvide's attorneys to the Navy's Professional Integrity Office, and did not recall ever having seen the Agreement signed by Hvide on November 4, 2000. In addition, he testified that it would not be important for him to know of the existence of that Agreement.

PFF92. On September 18, 2001, Tugz sent a letter to the CPA updating its previously-submitted tug franchise application, an application that Tugz believed was pending. Tugz requested that the application be heard and granted.

PFF93. CPA responded to Tugz with a letter dated September 25, 2001, explaining that the CPA had not accepted Tugz's application and that the Tugz franchise application was not pending before the CPA. Further, "the staff of the [CPA] does not recommend that another tug and towing franchise be issued in Port Canaveral at this time. Our position is clear and I will not be placing Tugz's application on the [CPA's] meeting agenda."

PFF94. Consequently, Tugz sent a reply letter to the CPA dated October 29, 2001, requesting that the Port Commission hold a formal and thorough hearing on Tugz's application and noting that the Commission had neither addressed nor taken any action on Tugz's application.

BFF94. Mr. McLouth's predecessor as Executive Director, Mr. Rowland, has argued on several occasions that any action taken with respect to tug services on the military side of the port will have a direct impact on the civilian portion as well.

BFF95. CPA was aware on July 21, 2000, that failure to grant Petchem's application for a tug and towing franchise might result in Petchem's withdrawal from the port and in Seabulk performing all of the military as well as commercial towing in the port.[29] Military tug business is a growing part of the market for tug services in Port Canaveral and has helped to offset the decline in Seabulk's tug moves for cruise vessels.

BFF96. Both Mr. Rowland and Captain Bancroft had previously taken the position that having one tug company performing both military and commercial tug services was beneficial to CPA.

BFF97. When CPA issued its Request for Qualifications for an Additional Tug Franchise in May 2002, one of the minimum criteria was submarine fendering, which is not necessary for commercial tug services.

BFF98. CPA has accepted, without challenge, statements from Hvide/Seabulk representatives on various occasions, including the hearing of convenience and necessity on July 21, 2000, that Hvide has been accident free in Port Canaveral for more than forty years. While the evidence showed that Hvide/Seabulk tugs have been involved in at least five documented incidents, only one of them was proven to have been reported to CPA. In that instance, the former

[29] Contrary to BOE's assertion, Petchem's counsel did not state that failure to grant Petchem's request for a tug "would likely result" in Petchem's withdrawal from the port.

Commanding Officer of NOTU testified that a Hvide tug had damaged an acoustic tile on a U.S. Navy attack submarine within the past few years.[30]

I. Various CPA Actions Favoring Hvide/Seabulk[31]

BFF99. Even before the military contract was awarded to Petchem in December 1983, CPA's Executive Director wrote to the U.S. Air Force to express "regret that the An Force is competing this contract through a procedure which precludes Port Everglades Towing [Hvide] . . . from bidding on the new contract, and hope that the Air Force will reconsider use of this procedure."

BFF100. On March 20, 1986, CPA's Executive Director again complained to U.S. Government contracting officials about the small business set-aside under which the military tug contract in Port Canaveral was about to be re-bid, stating that ". . . [t]his contract proposal will have both direct and indirect impact on commercial shipping operations in Port Canaveral . . . ."

BFF101. Prior to Hvide's disqualification from bidding on the military contract because of its revenue growth, there is no evidence that CPA has ever complained about the military's use of the small business set-aside for tug services in Port Canaveral.

FF102. By letter dated April 24, 1986, CPA's Executive Director made a further effort to influence the military's tug contract by arguing that a small business set-aside is more expensive, "particularly if it results in bringing in a contractor who is only licensed to move military ships. See

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30 BOE introduced U.S. Coast Guard records reflecting four incidents since September 16, 1994 in which Hvide/Seabulk tugs have been involved in accidents in Port Canaveral *Worden Exhibit 3, Bates R3089-3093* However, there is insufficient proof that CPA knew or should have known of these incidents.

31 CPA did not dispute these assertions, but objected to the relevance of actions by its staff regarding the award of tug contract by the U.S. Navy. However, CPA's injection into the affairs of the U.S. Navy is appropriate because military tug services form part of the relevant market.

the enclosed Federal Maritime Commission decision concerning Petchem v. Canaveral Port Authority." This letter to U.S. Navy contracting officials also suggests that if the Navy intends to maintain the contract as a set-aside, companies with less than 250 employees be considered small businesses. In his deposition, Mr. Rowland acknowledged that his goal in writing this letter was to have one tug company in the port providing both the commercial and military services and that the only company that was eligible to provide commercial services at that time was Hvide.[32]

BFF103. NOTU is responsible for, among other things, coordinating tug services for all military vessels calling at Port Canaveral. As Commanding Officer of NOTU between 1983 and 1990, Captain Bancroft actively opposed the small business set-aside which precluded Hvide from bidding on the military tug contract from 1983 onward.

BFF104. There were no problems with Petchem's tug services during Captain Bancroft's tenure with NOTU, between 1983 and 1990. In fact, Petchem received commendations from the U.S. Navy for its tug services in Port Canaveral.

BFF105. On June 2, 1994, CPA's Deputy Executive Director sent a memorandum to all prospective bidders on the upcoming U.S. Navy tug contract notifying them that there would be no long term berthing space available in the port for the successful bidder's tugboats. Hvide's tugs have always had berthing space in the port.

BFF106. On November 22, 1996, CPA's Executive Director sent a letter to the Commanding Officer of NOTU expressing concern that Petchem tugs were precluded by the military contract from assisting Hvide's tugs, "even when deemed necessary and prudent as a result

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Notwithstanding CPA's insistence that it did not inject itself into the U S. Navy's tug services, the documentary proof overwhelmingly establishes that CPA initiated the contacts.

of weather or any other unforeseen dangerous circumstances." Subsequent to that letter, meetings were held between CPA, NOTU, Canaveral Pilots and others on this subject. Ultimately, the resolution was that tugs under contract to the military could only perform commercial tug services in an emergency.

BFF107. In April 1999, both Mr. Rowland and Captain Bancroft communicated with Navy officials regarding the upcoming bids for a military tug contract. Captain Bancroft sought to get a single contract for military and commercial tug services and contacted the Commanding Officer of NOTU, as well as a contracting official at the Military Sealift Command, on this subject. The restriction imposed by the military on the use for commercial services of tugs under contract to the military was still in effect in 1999. The military contract expired on December 14, 1999, and a new contract was not executed.

BFF108. On July 9, 1999, the President of the Canaveral Pilots Association, John M. Boltz, wrote to the Commanding Officer of NOTU expressing concerns over downgrading of tug services below the two companies and five tugs then available in the port, stating that: "I am concerned that if one company controls the service to both the Navy and the Commercial Sector that safety and efficiency will be sacrificed." Almost six months later, after Petchem's contract with the military was terminated, and Petchem announced its desire to apply for a commercial tug franchise, CPA's Deputy Executive Director contacted Mr. Boltz and requested a clarification of the quoted language of the July 9th letter. In a letter dated January 10, 2000, Mr. Boltz retracted his stated concern about a single tug company and restated his concerns in terms of the number and capabilities of the tugs, and the notice required to crew them.

BFF109. Eugene Sweeney, was the President of Hvide from January 1, 2000 to September 1, 2000. Prior to that, he was Executive Vice-President and Chief Operating Officer of Hvide for three or four years. Mr. Sweeney has also been a member of the Florida Board of Pilots Commissioners for the past three and one-half years. This Board issues and regulates licenses of state pilots and oversees the activities of pilots, including those who are members of the Canaveral Pilots Association.

BFF110. On January 4, 2000, a meeting was held among CPA's Executive Director, CPA's Deputy Executive Director and Mr. William Ludt, President of Hvide Marine Towing, Inc., and possibly others from Hvide, at which Petchem's announced intent to seek a commercial tug franchise was discussed. In a letter dated January 7, 2000, Mr. Ludt thanked Mr. Rowland for the meeting on January 4, asked for "written confirmation that our Franchise has been rolled over for the year 2000," and, among other things, stated:

> As we are actively studying Port Canaveral's future equipment requirements and the additional capital commitments that may be required, it is extremely important that we be kept informed of all activities relative to Towing Franchising at Port Canaveral. Specifically, we request that we be officially notified in the event that Petchem, or any other entity, formally applies for a Towing Franchise at Port Canaveral.[33]

BFF111. Hvide was kept informed, as requested, by CPA's Deputy Executive Director.

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CPA objected to the implication that it conspired with Seabulk regarding Petchem's application for a franchise. While CPA correctly notes that it was not prohibited from notifying Seabulk that it was considering holding a public hearing for another tug franchise, the fact that CPA had extensive discussions with Seabulk prior to such a hearing is relevant as to the reasonableness of CPA's actions toward Petchem.

BFFl12. At CPA's hearing of convenience and necessity on July 21, 2000, Petchem's application for a tug and towing franchise was denied by unanimous vote after CPA's Commissioners took a ten minute break to review the materials submitted. Petchem's application consisted of 174 pages.[34]

J. Restrictions on Tug Competition, and Related Effects on Service and Price

BFFl13. Port Canaveral is one of only three ports in the continental United States in which a tug company is required to obtain a local government franchise to provide tug services. The other two ports are Port Everglades and Port Manatee, Florida. .[35]

BFF114. In virtually all other U.S. ports, competition determines who provides tug services, and vessel operators/agents are free to choose the tug company that best suits their needs.

BFFl15. In Port Canaveral, the vessel operator has no choice other than to use the tug company selected and franchised by CPA. This same tug company has been selected by CPA since 1958.

BFFl16. The inability of tug users to select the tug company of their choosing has created problems for some of those users, and potential problems for others. Sterling Casino Lines, operator of the *M/V New Yorker* has complained that Hvide's large tugs were too powerful and had caused damage to that vessel when it operated in Port Canaveral. Sterling Casino was denied the right to use a smaller tug operated by ITS which was ideal for their requirements, despite a letter from the master and pilot of this vessel raising safety issues with CPA and the U.S. Coast Guard.

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[34] CPA contends that BOE failed to explain that CPA Commissioners were briefed at the hearing by staff who had reviewed the application in detail. However, the ultimate decision lay with the Commissioners and the time that they spent reviewing Petchem's application is relevant in determining whether their denial was reasonable.

[35] Order of Investigation at 2.

BFFl17. In June 1997, Captain Earl McMillin, a Canaveral Pilot, wrote to Captain Bancroft concerning problems handling Premier Cruise Line's vessel, the *Oceanic,* in strong northerly winds, with only two tugs readily available from Hvide. He noted that, while Hvide had a third tug in the port, "there have been instances when it has taken 8 to 9 hours to crew the third tug. . . ." Captain McMillin sought help from CPA in resolving this deficiency, either through crewing additions for Hvide, or allowing Petchem's tugs to perform commercial services.

BFFl18. From September 1998 through January 2000, Coastal's fuel barges were late delivering fuel to ships forty-one times because they were forced to use Hvide's tugs which were often busy with other jobs. At least one of Coastal's customers threatened to fuel their ships elsewhere if Coastal could not get its barges to their ships in a more timely manner. Moreover, Hvide charged Coastal rates 17 percent higher than the rates charged by ITS for the same service.

BFF119. In 1999, when the bow thrusters were inoperable on the gambling ship *M/V Ambassador,* Sterling Casino Lines tried to use ITS tugs, but was forced to use Hvide's tugs at rates 67 percent higher than those charged by ITS.

BFF120. In 1999, the operator of a small casino gambling vessel, *Sun Cruz VIII,* was forced to use Hvide's tugs at rates 67 percent higher than those charged by ITS, despite the position taken by Mr. Rowland in his testimony in this proceeding that vessels docking at bulkheads in the port are not required to use Hvide's tugs.

BFF 12 1. Large cruise ships calling at Port Canaveral would prefer to have two tractor tugs available in the event that weather or emergencies require the use of tugs. Tugz offered to place two or more tractor tugs in Port Canaveral, and CPA refused to consider Tugz's application for a franchise.

BFF122. It is a well-established and fundamental economic tenet that free and open competition can best satisfy consumer demand at the lowest price with the sacrifice of fewest resources. Competition has not been allowed to work in Port Canaveral, unlike almost every other U.S. port.

BFF123. At least eight users of tug services in Port Canaveral provided letters of support for Petchem's application for a tug franchise in 2000. Generally, those letters expressed a desire for free and open competition for tug services in the port.

BFF124. In addition, the member lines of the Florida-Caribbean Cruise Association, which consists of all the major cruise lines calling at Florida ports, including Port Canaveral, sent a letter to CPA in October 2001 in support of Tugz's application, stating that: "The cruise industry is always in favor of competition and never in favor of monopolies."

BFF125. A comparison of tug prices between different ports based upon tariff rates is meaningless for several reasons. First, varied, and sometimes large, discounts from tariff rates are provided to tug users in Port Canaveral as well as other ports. Second, even if actual prices were available, any such comparison using actual prices must weigh numerous other factors such as the type of vessel, the time necessary to perform the tug service and the difficulties inherent in the move. From an economic perspective, it is less important to focus on tug rates in other ports than on the question of what would happen to tug rates in Port Canaveral in a free market system.[36]

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[36] The relevant market for analysis is the market for tug services at Port Canaveral, Furthermore, Hvide admitted m its financial report that "[e]ach port is generally a distinct market for harbor tugs, even though harbor tugs can be moved from port to port." (BOE Reply at 24).

BFF126. The franchise system itself creates barriers to entry for potential providers of tug services at Port Canaveral and renders the market uncontestable.[37]

BFF127. CPA's franchise system, which has allowed Seabulk to be the sole provider of tug services at the port, has resulted in inefficient pricing. The same rates are charged for the tractor tug as for a conventional tug. The tug customers that allegedly need the tractor tug the most, the cruise lines, are using tug services the least and obtaining greater discounts for tug services. On the other hand, cargo carriers, which need tug services the most, but do not require a tractor tug, are paying not only the majority of money, but also higher rates, to keep the tractor tug at the port.[38]

BFF128. CPA has created, through its exclusive franchise arrangement, a situation where cargo carriers are forced to subsidize the cost of keeping a tractor tug at the port when this provides little benefit to them. In addition, the position of the port that there should be only one tug company for both military and commercial work places the military in the position of contributing revenues to maintain the presence of a tractor tug in the port.

BFF129. Mr. Worden, an economist with the Commission's Bureau of Trade Analysis, contacted twenty-two port officials along the U.S. Atlantic and Gulf Coasts concerning tug services

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[37] BOE's reference to minimum equipment requirements imposed by CPA upon potential tug operators was not adopted, as such a requirement was applied on only one occasion - while the parties were attempting to settle this proceeding in May 2002 - and is inadmissible.

[38] Mr. Worden appropriately based his opinion on Seabulk's business records for each year from 1999 to 2002. That information was broken down onto two Tables statmg the number of tug Jobs and revenue earned by Seabulk each year m each area of towing service at Port Canaveral: cruise vessels, military vessels, and cargo vessels

at their ports. None of these ports require specific equipment, full time service, or firefighting capability as a condition of providing tug services.[39]

BFF130. Except for Eastport, Maine, where the port provides its own tug services, every one of these twenty-two ports allow the market to determine the type of tug equipment and services offered to port customers.

BFF13 1. Most of these ports, some smaller than Port Canaveral, receive 24 hour/7 day tug service without port-imposed requirements because that is what their customers demand.

BFF132. Most of these ports look to the local fire department as the primary responder to a fire at the port. Some ports have a fireboat to respond to a fire, and others have a contract with a tug company to maintain certain firefighting capability to respond to a tire at the port.

BFF133. The competitive market has not failed to meet the demand for tug services at these ports, whether this results in one or many tug company serving these various ports. None of the twenty-two ports contacted by Mr. Worden are experiencing problems of inferior tug services. Many of these ports have tractor tugs, not because of port requirements, but because of customer demand. The former President of Hvide Marine Towing, Inc. testified that Hvide would have brought the tractor tug into Port Canaveral if customers demanded, and were willing to pay for it, whether or not it was required by the franchise. In fact, the franchise did not require a tractor tug in Port Canaveral when it was first brought in, and CPA was not consulted.

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[39] CPA attacked the methodology undertaken by Mr. Worden in obtammg information at the ports, specifically asserting that he asked a minimum of questions relating to firefighting and continuing availability, and in certain instances spoke to public relations officials, instead of senior operational staff. However, cross-exammatron of Mr. Worden and his notes from those interviews demonstrated a thorough investigation of tug assist services at those ports. He spoke with marketing and operational staff with knowledge of the types tug service systems in place at those ports.

BFF134. Moran Towing Company, Inc. ("Moran") and McAllister Towing Company, Inc. ("McAllister") are major providers of tug services in ports along the Atlantic and Gulf coasts. Moran provides tug services in thirteen ports and McAllister provides tug services in nine ports, None of the ports in which these companies operate requires them to provide 24 hour/7 day service, maintain specific equipment at the port or provide firefighting equipment. The equipment and services that they offer at each port is a commercial decision based upon customer needs. Each company has firefighting equipment on some of their tugs because certain carriers require this service.

BFF135. At a few ports, Moran and McAllister are the sole providers of tug services, but have an incentive to operate efficiently because, at any time, a competitor could offer any type of tug services at these ports, regardless whether there is sufficient demand for the services of more than one tug operator.

BFF137. Ernest Worden was qualified as an expert witness on economic matters in this proceeding.

BFF138. Captain James C. DeSimone, Senior Vice President of Tugz, is a licensed Master, former Vice-President of State University of New York Maritime College, and has taught ship-handling in the U.S. Navy as well as on the training ship for the Maritime College.

DISCUSSION AND CONCLUSIONS[40]

Jurisdiction

Before determining whether a decision on the merits is warranted, CPA's pre-hearing motion for an order dismissing this proceeding must be addressed. CPA's motion is premised on two basic arguments: (1) the 1984 Act does not provide the Commission with jurisdiction over any dispute relating to a tug franchise; and (2) the relief sought by BOE against CPA would violate its rights as an arm of the State of Florida under the Tenth Amendment to the United States Constitution to be free from "micromanagement" by the federal government.

CPA asserts that the Commission exceeded its statutory jurisdiction in issuing its Order of Investigation and Hearing because the dispute does not involve a regulated activity of a marine terminal operator, but rather, an unregulated navigational activity. It attempts to distinguish this proceeding from relevant court and Commission decisions holding that the Commission has jurisdiction over towing or other navigational activities controlled by marine terminal operators who administer towing operations that are exclusive and mandatory on vessels that use a port's facilities. CPA also contends that the Commission violated the Tenth Amendment to the United States Constitution by attempting to impose the creation of a new towing system at Port Canaveral,

BOE and Petchem oppose the motion on the ground that the 1984 Act gives the Commission jurisdiction over CPA's towing activities. They contend that the regulation of tug services by CPA, a marine terminal operator, are regulated by the Commission because the system that has been in place for forty-four years has been exclusive and monopolistic. As a result, CPA has denied two

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[40] Petchem, as an intervenor in this proceedmg, chose to rely substantially on the legal position of BOE. Petchem Brief at 25.

applications by Petchem, ignored an application by Tugz and pressured vessel operators to discontinue using tugs operated by International Towing and Salvage (ITS). Therefore, BOE and Petchem assert that there are factual issues precluding a dismissal at this stage of the proceeding.

In a prior ruling, I denied CPA's motion to stay discovery pending a Commission decision in the companion proceeding in Canaveral *Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate,* Docket *No. 02-02. Rulings on Dismissal and Discovery Motions,* August 16, 2002 at 7. CPA's motion was based on the same constitutional and jurisdictional issues advanced here. However, CPA's arguments were not convincing then and are not convincing now. The Commission has jurisdiction over marine terminal operators. 46 U.S.C. app. § 1702(14). It is not disputed that CPA is a marine terminal operator. It does not engage in towing, an activity over which the Commission does not normally have jurisdiction. Nevertheless, the Commission has consistently held, including during CPA's earlier round of litigation on the same subject, that tug services fall within its jurisdiction in situations where marine terminal operators exercise control over tug services in a manner that limits or controls access to terminal facilities. *Petchem, Inc. v. Canaveral Port Authority, 28* F.M.C. 281,293 (1986); *A.P. St. Philip, Inc. v. Atlantic Land and Improvement Company and Seaboard Coast Line R. Co.,* 13 F.M.C. 166, 171-172 (1969).

CPA's discussion of the legislative history of the Shipping Act of 1916 (1916 Act) accurately explains that Congress expressly intended to remove tug services from the language of that statute and the 1984 Act did not change that. However, terminal functions were not excluded from either statute and, in *A.P. St. Philip, Inc., supra,* the Commission determined that a terminal operator's actions with respect to tug services could, under certain circumstances, constitute a

covered practice of a terminal facility. In that proceeding, a tug operator initiated a proceeding against a terminal operator who gave complainant's competitor an exclusive contract to provide tug assistance to all vessels requesting such services at Port Tampa. In holding that the terminal operator's preferential treatment for complainant's competitor constituted an undue and unreasonable practice, the Commission distinguished between terminal functions, which were covered by the Shipping Act, and navigational activities, which were not:

> Normally, it is true that the selection of the tugboat operator is within the exclusive province of the carrier and that terminals themselves do not become involved in the docking and undocking of vessels or in the arrangements therefor. We would, therefore, ordinarily agree that tugboat services does not constitute a terminal function within the scope of section 17. Where, as here, the terminal operator has usurped the normal function of the carrier and made the very access to the terminal facilities dependent upon a commitment to Tampa Towing for tug service under the terms of the an exclusive-right contract, the furnishing of tugboat service has, in effect, been transformed into a terminal function intimately related to the "receiving, handling, transporting, storing, or delivering of property."
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> * * *
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> Thus, by the execution of the exclusive contract with Tampa Towing, Atlantic has through its participation in the operation and control of the terminal facility subjected itself to the jurisdiction of the Shipping Act, and the question now becomes whether the practice of conditioning the availability of the terminal facilities only to vessels who utilize the services of a designated tugboat operator, is unreasonable or unjust within the meaning of section 17 of that act.

Id.

In Petchem, Inc. v. Canaveral Port Authority, supra, the Commission reaffirmed its decision in *A.P. St. Philip* and held that the exclusive franchise agreement between CPA and Hvide Shipping, Inc. constituted a terminal function under the jurisdiction of the 19 16 and 1984 Acts. The

Commission disagreed with CPA's reliance on *Bethlehem Steel Corp. v. Indiana Port Commission*, 21 F.M.C. 629 (1979), where the Commission declined jurisdiction over a dispute involving the imposition of a fee in order to defray port construction costs:

> Respondent's analysis is incorrect. The essential facts of *Bethlehem Steel* should be distinguished from those of *St. Phzlzp* and this case. The effect of a harbor construction fee on a ship's access to terminal facilities is far more remote and tangential than that of tug service. Moreover, two decisions more recent than *Bethlehem Steel* indicate that the theory articulated in *St. Philip* has continuing vitality. In *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District,* 25 F.M.C. 59 (1982), the Commission stated:
>
> > The statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation. *Id.* at 1079.

CPA attempts to distinguish the facts in this proceeding from those in *A.P. St. Philip* **and** its earlier round of litigation in *Petchem, Inc.* based on the non-exclusive label of the current tug service franchise agreement. It is correct in arguing that if the agreement between CPA and Seabulk were non-exclusive and, therefore, tug services were not controlled by CPA as a condition to docking and undocking at it terminal facilities, the Commission would lack jurisdiction under the analysis in *A.P. St. Philip, Inc.* and *Petchem, Inc.* However, as of the date that CPA's motion to dismiss was fully submitted, BOE and Petchem had submitted extensive written testimony on their direct cases. The essence of such testimony, which must be carefully considered in connection with CPA's motion to dismiss, is that the CPA-Seabulk franchise agreement had the effect of excluding any other tug operator from providing tug services at Port Canaveral. Accordingly, an issue of fact

was raised as to whether the tug franchise agreement was exclusive or non-exclusive in nature and this branch of the motion is denied.

CPA also contends that the Commission lacks the constitutional authority to impose the relief sought by BOE. It concedes that the Order of Investigation and Hearing does not seek a specific remedy against CPA, but relies on the written testimony of Ernest Worden as support for the belief that the Commission intends to dismantle CPA's non-exclusive franchise system and replace it with a free market and minimal local government regulation. CPA asserts that such an order would violate the Tenth Amendment by usurping a power which was not expressly delegated to the federal government and was, therefore, reserved to the States.

However, Article I, § 8, clause 3 of the United States Constitution, generally referred to as the Commerce Clause, gave the federal government certain enumerated powers over interstate and federal commerce. It was under the authority of the Commerce Clause that Congress created the Commission and its predecessors, and the Supreme Court subsequently confirmed the federal government's jurisdiction to regulate State-owned terminal operators. *Federal Maritime Commission v. South Carolina State Ports Authority, 535* U.S. *743 (2002); California v. United States, 320* U.S. 577, 580 (1944). CPA relies on two recent cases involving federal directives that were struck down because they bore no relationship to an enumerated federal power and were therefore an unconstitutional imposition of power by the federal government upon **state** governments. *Prince v. United States,* 521 U.S. 898 (1997) (invalidating portion of Brady Handgun Act that required local governments to register handgun sales); New *York v. United States, 505* U.S. 144 (1992) (invalidating federal statute that compelled states to take title to radioactive waste). However, this proceeding involves the power of a federal agency to order a state-controlled marine

terminal operator from violating the 1984 Act. It does not involve an attempt by a federal agency to compel a state to enact or enforce a federal regulation. Moreover, the Commission's Order of Investigation and Hearing requires a determination of whether any violations, penalties or a cease and desist order are necessary. Accordingly, this branch of the motion is also denied.

Furthermore, the Commission's recent decision in Docket No. 02-02, where CPA raised the identical jurisdictional arguments, expressly rejected CPA's arguments:

> The instant case falls squarely within the jurisdictional parameters set forth in *A.P. St. Philip, Inc.* and *Petchem.* CPA contends that this is not possible because Seabulk does not have an exclusive contract. CPA at 14. We find, however, that although Seabulk's arrangement is denominated a "non-exclusive franchise, it is a *de facto* exclusive arrangement. CPA has granted a franchise to one tug company, Seabulk, for tug services for the entire public area of the port. FF 8, 16. Seabulk has been the only tug provider granted a franchise at the port since 1958. FF 8. After receiving the application from Tugz, CPA renewed the franchise agreement with Seabulk in April, 2001, granting Seabulk a ten year franchise. FF 16. The agreement provides that CPA will not grant another franchise "without first having a public hearing showing a convenience and necessity." FF 16; CPA at Attachment 8. Furthermore, CPA restricts access to the port through its franchise system; vessels may access the port only by using Seabulk's tug services. By controlling who offer tug services and by granting that right to only one tug company, CPA has made access to the terminals and terminal facilities dependent on a commitment to Seabulk, and thus has limited the prerogative of carriers to choose a tug operator. Therefore, the restriction on tug choice appears to relate directly to the receiving, handling, storing, or delivering of property at the terminals and not navigational-related (i.e., related to the harbor waters or non-terminal facilities) like the fees assessed in *Bethlehem Steel.*

The Commission's rejection of CPA's jurisdictional arguments preclude further litigation of CPA's jurisdictional arguments, as well as the claim that Seabulk's franchise was non-exclusive. *Astoria Fed. Savings &Loan Ass'n v. Solimino,* 50 1 U.S. 104,107 (199 1) (the high court has "long

favored application of the common-law doctrines of collateral estoppel [as to issues] and res judicata [as to claims] to those determinations of administrative bodies that have attained finality."); *United States v. Utah Constr. & Mining* Co., 384 U.S. 394,422 (1966) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."); *Dynaquest Corp. v. U.S. Postal Service, 242* F.3d1070, 1074-75 (D.C. Cir. 2001) (judicial decision that money in an escrow account must be returned to people who attempted to order a falsely advertised instructional course precluded relitigation of that issue before Postal Service judicial officer).

CPA failed to establish, observe and enforce and implement reasonable regulations and practices relating to tug services

BOE has the burden of persuading the Commission that CPA's practice of perpetuating Seabulk's exclusive tug franchise was unreasonable. If BOE succeeds in that regard, the burden of proving justification for the exclusive system shifts to CPA. *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation, 28* S.R.R. *75* 1,765 (1999); *All Marine Moorings v. ITO Corp. of Baltimore, 27* S.R.R. 539, 545-47 (1996).

The facts clearly establish that CPA has no standards, regulations or procedure governing applications for tug franchises. The only guiding principle that it has followed consistently is to take all actions necessary to preserve Seabulk's monopoly over the commercial and military tug markets at Port Canaveral. BFF72-79. The alleged standard utilized by CPA, a hearing of convenience and necessity, is a deplorable excuse for due process. CPA had no definition of that term or procedure as to how or when it should be applied. The term is stated in the CPA/Seabulk

franchise agreement, but does not appear in state or federal statutes and is not an element of any other agreement, license, lease or permit negotiated or issued by the CPA to other users of the port. PFF5 1; BFF3 1, 126. Therefore, by relying on that vague standard, CPA failed to observe just and reasonable regulations and practices.

Even were one to ascribe legitimacy to the "convenience and necessity" standard, the facts reveal a whimsical approach by CPA in implementing it. Since 1958, Seabulk and its predecessor, Hvide, have been the lone providers of commercial tug services in Port Canaveral. In January 1975, CPA awarded Hvide a ten-year tug franchise and it was renewed from year to year. CPA offered no proof that Seabulk was forced to demonstrate "convenience and necessity" at that or any other time.[41] There was an annual franchise fee of $250. The franchise agreement was terminable by either party on sixty days notice, required Hvide to operate two or more modem tug boats and provide fire-fighting service to meet the towing requirements in the port. CPA was not permitted to grant another tug franchise without first having a public hearing showing a "convenience and necessity." BFF26-29.

Until 1984, Hvide also performed all of the military tug services in the port pursuant to the small business set-aside program. By that time, Hvide had become too large to qualify as a small business and was replaced by a small business, Petchem. However, Hvide continued to operate as

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[41] *See, Commonwealth of Puerto Rico* v *FMC, 468* F.2d 872, 880 (D.C. Cu. 1972) ("In regulatory proceedmgs, placing such a burden on the regulated firm, where the relevant mformation concerns its operations and management, has become part of the 'common lore' of regulations."); *Alabama Power Company v Federal Power Commission,* 511 F.2d 383, 391 (D.C. Cir. 1974), citing McCormick, *Evidence* § *337* at 787 (2d Ed. 1972) ("It is a familiar rule of evidence that a party having control of mformation bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so").

the only authorized tug operator under its 1975 Franchise until that agreement was amended in April 200 1. BFF32-33.

On December 15, 1983, having been awarded the military contract, Petchem applied to CPA for a commercial towing franchise. That application was denied by CPA on February 16, 1984. BFF35. Petchem responded by tiling a complaint with the Commission. After a hearing, Judge Ingolia concluded that Hvide's exclusive franchise was prejudicial to Petchem and other potential commercial tug operators. *Petchem, Inc. v. Canaveral Port Authority, 23* S.R.R. 480, 499 (I.D. 1985). However, the Commission reversed the Initial Decision on the merits and upheld CPA's denial of Petchem's application for a tug franchise, finding that CPA offered sufficient justifications for its action. *Petchem, Inc. v. Canaveral Port Authority, 23* S.R.R. 974, 990-991 (1986). The Court of Appeals affirmed the Commission's decision based on several material factors, none of which apply any longer: at the time the application was denied, Petchem had no prior towing experience; Petchem had only two tugs with which to serve both military and commercial shipping; Hvide, although having just lost its military towing contract in the port, agreed to continue its commercial towing work, even though it projected substantial initial losses; and Hvide would have withdrawn from the port upon entry of a another commercial tug operator. *Petchem, Inc. v. Federal Maritime Commission, 853* F.2d 958, 964-65 (D.C. Cir. 1988).

In 1999, Petchem renewed its request to CPA for a commercial tug franchise. A hearing of "convenience and necessity" was eventually held on July 21, 2000, but not before CPA staff consulted with Seabulk. The delay in affording Petchem a hearing enabled Seabulk to deploy a tractor tug, for which there was no demand at the time. In the opinion of CPA's expert, Seabulk's response to the CPA consultation was to preempt competition. PFF50-66.

As a result, CPA Commissioners staff recommended at the hearing that Petchem's application be denied because Seabulk had enough tugs in the port, was doing a good job and **there** was not enough business for more than one tug operator. That decision was an unreasonable practice as Petchem demonstrated that it was qualified and informed CPA Commissioners of numerous problems encountered by Seabulk at that time. Mr. Bancroft admitted that the issues were irrelevant, as he never considered Petchem's application. The Commissioners then spent a mere ten minutes reviewing Petchem's extensive proposal for the first time. PFF74-80; BFF42-43, 86-93, 98, 112. While Commissioners acted reasonably in granting Petchem's request that Tugz's application not be considered together with Petchem's application at the July 2 1, 2000 hearing, CPA has acted unreasonably in failing to ever consider Tugz's application or its updated 2001 application. BFF40-41; PFF92-94.

After subjecting Petchem to a hearing of convenience and necessity and declining to give Tugz one, CPA again ignored that requirement with respect to and Seabulk and amended the franchise agreement on April 18, 2001 and extended it for another ten years. CPA obviously attempted to insulate itself from legal challenge by labeling the amended franchise as "non-exclusive." BFF45-48.

There Is Enough Business In The Relevant Market To Support Free And Open Competition

CPA and Seabulk aver that there is insufficient business in the port to justify economically the operation of more than one tug operator. For purposes of determining whether they are correct, one must determine the relevant market. *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation, 28* S.R.R. *75* **1** (1999); *All Marine Moorings v. ITO Corp. of Baltimore,* 27 S.R.R. 539, 545 (1996). The relevant market is Port Canaveral. Furthermore, although CPA

only controls the commercial work, I find that the military tug services at Port Canaveral are part of the relevant market. Seabulk is the only tug operator providing military tug services, but there is no doubt that any other tug operators who are permitted to enter the commercial tug market in Port Canaveral would do so only after assessing their business potential there, including the military work. Seabulk's contention that the market should include other ports in the region because unhappy customers can go elsewhere is not reasonable. Seabulk Brief at 33. The nearest port is 150 miles away and cruise lines and other carriers would not go elsewhere since the record established that there is a market for their services in the Port Canaveral area.

The facts do not support CPA's contention that there is room for only one tug operator in the port. First, it is undisputed that Petchem and Seabulk co-existed in the port from 1983 until 1999, with Petchem performing the military work and Seabulk performing the commercial work, and that each company would occasionally assist the other when conditions required additional power or tugs. There were advantages to having Petchem in the port, especially in emergency situations, as up to four tugs were needed at times. PFF34-35. Second, tug-assisted commercial vessel moves at Port Canaveral increased from 188 in 1983 to 1,445 in 1999. It is undisputed that the demand for commercial tug services peaked in the late 1990s, when newer, larger cruise vessels with thrusters started arriving and had less reliance on tug services, and began to drop, particularly in the cruise ship sector. However, the demand for tug services rebounded somewhat for both cargo and cruise vessels in 2002.[42] Third, the demand for military tug services, which is part of the Port

[42] In any event, CPA's reliance on statistics of vessel movements is n-relevant, since the decline in tug use by cruise vessels had not begun of the date of the CPA hearing on July 2 1, 2000.

Canaveral market, has increased significantly from 357 tug moves during 2001 to 320 tug moves during the first seven months of 2002. BFF50-54.

Mr. Worden, an economist by training, explained that a port tug service of free and open competition is the cheapest and most efficient way to satisfy consumer demand. BFF122. CPA's expert, Mr. Arnold, responded to Mr. Worden's opinion by insisting that the objective should be efficiency through a mechanism of competitive bidding for one provider, which would provide the carriers with the best balance of price and quality of service. The basis for his opinion was mere conjecture that the market did not appear large enough to support open competition and that only one tug operator would be likely to survive. He failed to adequately refute the premise of Mr. Worden's opinion, i.e., that almost every other U.S. port has operated under a system of open competition. Furthermore, Mr. Arnold's concern, as well as that of the Commission in the *Petchem* case, regarding a lapse in service in the port if Petchem drove Hvide out of the port, no longer applies. From 1984 to 1999, Seabulk and Petchem split the commercial and military tug services in Port Canaveral and survived economically. Of greater significance, however, is the fact that the users want free and open competition; they want the right to choose. The evidence confirms such requests by the association that represents all of the major cruise lines and at least eight **other users** of Port Canaveral. BFF123-124.

Mr. Worden's analysis of tug operations at twenty-two port officials along the East and Gulf Coasts revealed that none of these ports require specific equipment, full time service, or firefighting capability as a condition of providing tug services. Except for the port in Eastport, Maine, which provides its own tug services, every one of these twenty-two ports allows the market to determine the type of tug equipment and services offered to port customers. Most of these ports, some smaller

than Port Canaveral, receive 24 hour/7 day tug service without port-imposed requirements based on customer demand. BFF 129-131.

CPA's franchise system, which has allowed Seabulk to be the sole provider of tug services at the port, has resulted in inefficient pricing. The cost of using a tractor tug is much more expensive than a regular tug, yet Seabulk makes no distinction in its rates between them. Seabulk is, in effect, subsidizing the cost ofkeeping a tractor tug in Port Canaveral by overcharging the users of regular tugs. This effectively has the most frequent users of the tractor tug, cruise lines, getting discounts, while the most frequent users of the regular tugs, cargo carriers, overpay. In addition, CPA's insistence that only one tug operator provide all commercial and military work places the military in the position of contributing revenues to maintain the presence of a tractor tug in the port. BFF127-128.

I found Mr. Worden more credible than either Messrs. Arnold or Dibner. Mr. Worden, an employee by BOE, was candid about his lack of experience in areas other than shipping regulation. However, his comprehensive analysis of other ports was helpful in determining customs and methods in the tug industry. The fact that he is an employee of the Commission is no different than an expert who is retained for hire, and I will take this precarious leap by assuming, since the questions were not asked, that Messrs. Dibner and Arnold did not provide services to Seabulk and CPA for free.

As noted by Petchem, Mr. Arnold has impressive experience dealing with foreign ports, but not U.S. ports, and does not have a background in economics. Additionally, I gave little weight to Mr. Dibner's June and November 2002 studies. As noted by Petchem, they were based on hypothetical companies and used models applying the standards emanating from the May 2002

RFQ, which I have disregarded. Petchem Reply at 24-25. If I were not to have disregarded it, I would have found that the RFQ was structured in a way to favor Seabulk, since no reasonable competitor would have duplicated all of the equipment already in the port. I give no weight to the July 2000 study because it was used in connection with a tainted hearing on July 21, 2000 and the record is replete with the problems that applied to Seabulk at that time.

The inability of tug users to select an operator other than Seabulk has created problems for some vessels and potential problems for others. In some instances, cruise lines believed that a smaller tug would have been appropriate for their types of vessels, but were forced to use Seabulk's large tugs, which were too powerful and, in one case damaged the vessel. Others have complained of instances in which Seabulk's tugs encountered problems in windy weather or were late delivering fuel to ships. Yet others, such as large cruise ships, would prefer to use two or more tractor tugs, which Tugz offered to bring into port, in the event of rough weather. Moreover, BOE produced evidence of two instances in which Seabulk charged vessels towing rates which were seventeen percent higher and sixty-seven percent higher than the rates charged by ITS, a small tug operator. BFF115-121.

CPA's Practices Have Resulted In Undue And Unreasonable Preference to Seabulk

Similarly, BOE bore the burden of persuading the Commission that CPA's practice of perpetuating Seabulk's exclusive tug franchise constitutes an unreasonable preference or prejudice. Having done that, the burden of refuting that shifted to CPA. *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation, 28* S.R.R. at *765; All Marine Moorings v. IT0 Corp. of Baltimore, 27* S.R.R. at 545-47.

BOE's burden was easily met, as the unreasonableness of CPA's actions was blatant. In 1999, CPA stepped-up its efforts and achieved success in its sixteen-year campaign to have the military abandon its contract with Petchem. The evidence was **clear that CPA** officials **wanted** Seabulk to have a monopoly over all of the tug service in the port. PFF32-36; BFF96, 99-103, 107.[43] CPA succeeded by attacking the small business set-aside program, an approach that it did not take when Hvide had the port's military work under the same program. BFF101. On December 14, 1999, Petchem's military contract to perform tug and towing service in Port Canaveral was terminated. From this point forward, tug support activity in the Port for military vessels was procured for each military vessel call. CPA advocated for Seabulk's monopolization of all work in the port while knowing that Hvide, in September 1999, filed for Chapter 11 protection from its creditors in federal bankruptcy court and that in October 1999, the seven top executives at Seabulk resigned. PFF46-47.

On December 16, 1999, after losing its contract with the military, Petchem again expressed interest in applying for a franchise to perform commercial tug and towing services in Port Canaveral and inquired as to the process to be followed. CPA's Executive Director responded five days later that CPA's Commissioners would consider the tug franchise application process at the next meeting on January 19, 2000, based on the recommendation of CPA staff However, even before Petchem submitted its letter expressing interest in obtaining a tug franchise, Mr. Rowland had already concluded that business in the port would not support another tug provider. BFF37, PFF49.

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[43] Mr. Bancroft's expressed opposition to small business set-asides as a reason why he opposed Petchem's military contract from 1983 to 1990 as a U.S. Navy officer at Port Canaveral and since 1990 as a CPA official is simply not credible since he did not express similar sentiments about Hvide when it had all of the port's military work pursuant to the small business program and was the only tug operator in the port. BFF 103.

Between December 1999 and January 2000, Petchem persisted in requesting consideration for a tug franchise. During this time, CPA responded by rebuking the Canaveral Pilots Association for intervening in the matter and advocating for an end to the single tug operator system. CPA also consulted with Seabulk about Petchem's request and Seabulk responded by deploying a tractor tug to the port in February 2000. This was a preemptive decision intended to keep Petchem out of the port. PFF50-65; BFF86, 110. The tractor tug, which was the first of its kind in the port, was significantly more capable and expensive than the single screw tugs which Seabulk had used for many years in the port. With the addition of the tractor tug, Seabulk had four tugs in the port, two staffed full time and two on standby. BFF39. According to Mr. Dibner, Seabulk's expert witness, this decision did not make economic sense. PFF60. Mr. Arnold, CPA's expert witness, was even more candid, opining that the sole purpose for the introduction of the tractor tug was to "improve the perceived level of service" and keep out any other tug operators, as there was no demand for such a tug. PFF66.

CPA Commissioners received a recommendation from staff on April 19, 2000 to hold a hearing of convenience and necessity on Petchem's application on July 21, 2000. On June 13, 2000, Tugz filed its application for a tug and towing franchise with CPA. Since CPA **had no guidelines** for such applications, Tugz patterned its application after the extensive guidelines published by Port Everglades. However, at the reasonable request of Petchem that its application be fully considered by CPA before it considered any other applications, CPA's Commissioners, at a meeting **on July** 19, 2000, denied Tugz's request that its application be considered at the hearing on July 21, 2000. No hearing was ever held on Tugz's application. BFF40-41.

The hearing of convenience and necessity was a travesty. Mr. Savas made a compelling presentation, which included an explanation of qualifications and documentary support by users of the port, information concerning Hvide's bankruptcy, precarious economic situation, Hvide's guilty plea to a felony entered on June 6, 2000 and possible disqualification from government contracts, pending lawsuits, involvement in accidents and control of the newly-formed Seabulk by third-party interests. Seabulk's President also testified at the hearing and claimed ignorance of any difficulties that might affect Hvide's ability to perform military contracts in the future. Rather than investigate the accusations and brief the Commissioners before they voted on Petchem's application, Mr. Bancroft, CPA's Deputy Executive Director, recommended against awarding a tug franchise to Petchem. He candidly admitted that he never considered Petchem's application and did not feel it was necessary to inform CPA's Commissioners of the issues raised by Petchem. The Commissioners then purported to review Petchem's extensive written proposal for approximately ten minutes before denying the request. Their rationale was that there was insufficient business in the port to support two tug operators and they were pleased with Seabulk's performance and the fact that it brought in the tractor tug. PFF74-80; BFF42-43, 86-93, 98, 112.

The harm to Petchem was clear. CPA's actions succeeded in forcing Petchem out of the port entirely. First, in 1999, CPA officials succeed in convincing military officials not to renew their contract with Petchem. This required Petchem to renew its application for a commercial tug franchise. After CPA denied that request on July 21, 2000, Petchem made a futile attempt to compete with Hvide. BFF95. However, Petchem was at an economic disadvantage and could not compete effectively. Thereafter, Hvide resumed its pre-1984 status as the sole provider of military and commercial tug services at Port Canaveral. PFF85, BFF44.

After seemingly ridding itself of Petchem, CPA and Seabulk amended the franchise agreement on April 18, 2001 and extended it for another ten years. The new agreement was labeled as a "non-exclusive" franchise, and significantly increased tug service requirements, including provision of the tractor tug on a full-time basis. However, on September 18, 2001, Tugz sent an updated application to CPA and requested a hearing on its its application for a non-exclusive tug franchise. Tugz's request was rejected by CPA's Executive Director September 25, 2001 on the frivolous ground that there was no application pending and there would not be one in the future. Tugz reiterated its request on October 29, 2001, but to no avail. BFF45-48; PFF92-94.

Use of Settlement-Related Information As Evidence

BOE and CPA each sought to use the settlement-related information from the actions and inaction of the parties during the period of March to June 2002. CPA contends that it undertook good faith efforts to resolve this proceeding by issuing an RFQ for an additional tug services franchise. Relying on the Commission's decision in *Banfi Products Corporation, 26* S.R.R. 95 1 (1993), CPA contends that its settlement efforts are admissible pursuant to Commission Rule 156, 46 C.F.R. $201.156, because it "does not seek to use the settlement evidence to establish the truth of the settlement discussions, but rather to explain why the Authority issued the RFQ in May2002." However, CPA goes on to state that it did not receive any applications in response to the RFQ and alludes to settlement proposals on other occasions. CPA Brief at 52-53. BOE on the other hand contends that CPA's RFQ set forth minimum standards which mirrored the equipment already being provided by Seabulk, and Seabulk's franchise was left intact while seeking bids for a second tug franchise. FF 79.

With the exception of their application to a determination of the applicable period for continuing violations, I have given no weight to any of the developments relating to settlement discussions in May 2002. It has long been the policy of the law to promote settlements, not create traps for the unwary. Each side wishes to use the RFQ for its own purpose and neither objects to its admissibility: BOE and Petchem contend that the RFQ did not provide a reasonable opportunity to obtain a commercial tug franchise; CPA attempts to use it as proof that it has a policy and procedure in place for a tug franchise, which neither Petchem nor Tugz expressed interest in. Commission Rule 91, 46 C.F.R. § 502.91, and its counterpart, F.R.C.P Rule 408, encourage settlements and render evidence of conduct or statements made in settlement negotiations inadmissible. Notwithstanding that the parties did not object to information regarding the RFQ, it would not be consistent with sound administrative practice for the presiding judge to consider evidence of the issuance of the RFQ, and the lack of responses to it, for purposes of determining whether CPA has engaged in unreasonable practices or given preferential treatment to Seabulk. However, Rule 408 recognizes that evidence of attempts to compromise may be used for other purposes and I find that it would be appropriate to consider settlement negotiations in determining the extent of the period of violations, discussed *infra*.

Assessment of a Civil Penalty

Having found violations of the 1984 Act, a civil penalty must be assessed. *Stallion Cargo, Inc. - Possible Violations*, 29 S.R.R. 665, 678 (2002). However, Section 13(c) requires that the presiding judge consider the following factors in determining the amount of the penalty: "the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and any such other

matters as justice may require." 46 U.S.C. app. §§ 1712(c). BOE concedes that CPA does not have a prior history of violations with the Commission. BOE Brief at 60. However, it strenuously asserted that all of the other factors were met.

Nature, Circumstances, Extent and Gravity of the Violations

BOE contends that substantial civil penalties of up to $30,000 per day should be assessed pursuant to section 13(a) of the 1984 Act, 46 U.S.C. app. § 17 1 2(a),[44] because CPA has knowingly, wilfully and continuously violated sections 1 O(d)(1) and 1 O(d)(4) of the 1984 Act by unreasonably refusing to grant Petchem's application, ignoring Tugz's application and perpetuating its exclusive franchise with Seabulk. As such, BOE suggests that the maximum penalties could be applied from the date of CPA's hearing of July 21, 2000 through February 25, 2003 because of the continuing harm to at least three interested tug operators and their vessel customers.[45] That period amounts to 956 days and, at a rate of $60,000 per day (for two violations), the maximum penalty would be $57,360,000. However, relying on Commission decisions involving substantial awards, BOE contends that a fine of $2,000,000 to $5,000,000 "would accomplish the desired goals of deterrence and future compliance, as well as acting, in the words of Judge Dolan, as a 'suitable punitive penalty."' BOE Brief at 57-61.

CPA objects to the assessment of any civil penalty, notes that a penalty of between $2,000,000 and $5,000,000 is more than 10% of its operating revenues and suggests that a

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[44] As amended pursuant to the Debt Collection Improvement Act of 1996, Public Law 104- 134

[45] BOE's remark that the "repeated and continued actions of CPA have protected a monopoly that has existed for 45 years" is irrelevant in determining the extent of the violations. First, the Commission determmed in the *Petchem* case that there were no violations prior to 1984. Second, Petchem did not resume its quest for a commercial tug franchise until it lost the military contract at Port Canaveral in 1999.

reasonable penalty under the circumstances would be an amount less than $1,000. CPA also provided a list of penalties assessed by the Commission for the period of 1992 through 2001 and requested that I take official notice of them in determining appropriate penalty, which I have done. However, only two of the assessments during that entire time were under $1,000. Furthermore, the total assessments do not indicate the amount attributed to each separate violation. CPA Reply at 36-46, Attachment 1.

Culpability

BOE contends that CPA knowingly and willingly created and maintained an exclusive tug franchise system for the protection of Seabulk and over a long period of time and exacerbated the problem by actively promoting an expansion of the tug assist monopoly to the military work in the port. BOE Brief at 59. CPA alleges that it was entitled to rely upon the Commission's decision in *Petchem v. Canaveral Port Authority,* 23 S.R.R. 974 (1986), as affirmed by the Court of Appeals in *Petchem v. Federal Maritime Comm 'n,* 853 F.2d 958 (D.C. Cir. 1988), which held that CPA's tug franchise system was not "unreasonable." CPA Reply at 38. Its argument is supported somewhat by the Commission's more recent decision in *River Parishes, supra,* approving another exclusive tug service arrangement similar to the one at Port Canaveral. Citing Judge Dolan's decision in *Sea-Land Service, Inc. - Possible Violations of Sections 1 O(b)(l), 1 0(b)(4) and 19(d) of the Shipping Act of 1984,* Docket No. 98-06 (I.D. January 30, 2003), CPA is correct in noting that a civil penalty is inappropriate when it is not "ascertainably certain" that the relevant conduct violates the statute or regulations.

On the other hand, CPA's decision to reclassify the agreement with Seabulk as a non-exclusive franchise in 2001, after Petchem renewed its request for a franchise and BOE began an

investigation, indicates that CPA was aware at that point of change in circumstances since its success in the *Petchem* case. Moreover, CPA's intrusion into the affairs of the **U.S. Navy** in **the port** proximately resulted in the decision of the latter not to renew Petchem's contract and **resulted** in Seabulk being the only tug operator in Port Canaveral. They had no reasonable basis for **such** advocacy other than accommodating the financial interests of Seabulk. Under Florida law, as a third party to the contractual relationship between the U.S. Navy and Petchem, CPA's conduct might well have been actionable as a tortious interference with contract. *See, Ernie Haire Ford, Inc. v. Ford Motor Company,* 260 F.3d 1285, 1294 (1 lth Cir. 2001); *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742* So.2d 381,386 (Fla. 4th DCA 1999); *Abruzzo v. Haller, 603* So.2d 1338 (Fla. 1st DCA 1992). As such, CPA appears to have overly relied on the *Petchem* decision in believing that the Commission would sanction its aggressive behavior in solidifymg Seabulk's monopoly over tug services at Port Canaveral. However, that does not establish a **level** of culpability warranting substantial civil penalties.

An assessment of the maximum in civil penalties requires a showing that CPA knowingly and willfully" violated the Act. A person is considered to have "knowingly and willfully" violated the Act if he or she had knowledge of the facts of the violation and intentionally violated or acted with reckless disregard, plain indifference or purposeful, obstinate behavior akin to gross negligence. *Rose International, Inc. v. Overseas Moving Network International, Ltd.,* 21 S.R.R. 119 (2001); *Portman Square, 28* S.R.R. at 84-85 (I.D.); *Ever Freight Int'l - Possible Violations, 28* S.R.R. 329, 333 (I.D.), administratively final, June 26, 1998. As previously discussed, this case involves an issue in which the case law and Commission decisions have provided marine terminal operators with a substantial amount of latitude in permitting them, under certain circumstances, to

award tug operators with exclusive tug service rights in a port. As such, it cannot be held that CPA's conduct, at the time of the violation on July 21, 2000 was so clear cut as to amount to "obstinate behavior akin to gross negligence."

The Ability to Pay the Penalty

The proponent of an order imposing a fine must present evidence of the violator's ability to pay the fine. 46 App. U.S.C. § 1712; *Merritt v. United States, 960* F.2d 15, 17 (2d Cir. 1992). Civil penalties are punitive in nature and the main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo, Inc. - Possible Violations, supra*; *Refrigerated Container Carriers Pty. Limited - Possible Violations*, *28* S.R.R. 799, 805 (I.D.), administratively final, May 21, 1999.

BOE contends that CPA has the ability to pay because it achieved operating revenues of $32,000,000 in 2000, has been financially self sufficient since 1986, funding all of its operations and capital improvements from user fees, tax free bonds and grants, and has the power to levy *ad valorem* taxes. BFF110. Citing *Diehl v. Franklin,* 826 F. Supp. 874 (D.N.J. 1993), CPA replied that BOE failed to meet its burden of proof. It avers that CPA operates on a small budget and the penalty proposed by BOE would amount to 10% of it annual operating revenue. CPA also contends that BOE conceded its inability to pay a civil penalty by the suggestion of an *ad valorem* tax on vessels using the port. CPA Reply at 40-42.

A comprehensive review ofreported decisions by the Commission, in addition to those cited by the parties, indicates that the Commission has never assessed a civil penalty against a state or local governmental entity. That does not mean that the Commission does not have the authority to do so, only that the opportunity has never arisen.

In the cases where the Commission has assessed a civil penalty, the respondents were private entities who profited from their violations. In those instances, a civil penalty would have the practical effect of recouping illegal profits and possibly assessing an additional amount as a deterrent. There is no doubt that CPA's actions perpetuated an exclusive and unreasonable tug service arrangement at Port Canaveral, which was to the detriment of other tug service competitors and the vessel customers in the port. However, other than collecting a nominal franchise fee of $250, CPA did not profit financially from its actions; this was not a revenue-producing activity for the port.

CPA has the ability to pay a penalty. See, *Green Master Int'l Freight Services Ltd - Possible Violations of Sections 1 O(a)(l) and 1 O(b)(l) of the Shipping Act of* 1984, Docket No. 01-10, slip op. at 16 (February 28, 2003) (civil penalty of $1,530,000 appropriate where it appears respondent is in a healthy financial condition and is able to pay the assessed penalty). The question is how much. CPA appears to be in good financial condition with $32,000,000 in operating revenue in 2000 and a staff of 158 people. However, BOE alluded to the possibility that CPA might have to shift some or all of the cost to users of the port through an *ad valorem* tax. In this instance, where there are no illegal profits or benefits to recoup, it would be unreasonable to equate the ability to tax innocent port customers and/or taxpayers. The deterrent and punitive measures envisioned by the 1984 Act would not be served under those circumstances and, therefore, I will not consider CPA's ability to assess taxes within the context of its ability to pay. Accordingly, I am not convinced that CPA, with its state-mandated operational and developmental obligations, has the ability to pay a substantial tine in the amount of $2,000,000 to $5,000,000.

Such Other Matters As Justice May Require

BOE asserts that there are parallels between this situation and violations addressed by Judge Dolan's assessment of the maximum penalty of $4,082,500 against a vessel-operating common carrier for 149 violations of section 10(b)(4) of the 1984 Act. *Sea-Land Service, Inc. - Possible Violations of Sections 1 O(b)(l), 1 O(b)(4) and 19(d) of the Shipping Act of 1984,* Docket No. 98-06, Slip Opinion at 171 (I.D., January 30, 2003). BOE believes that the situations are similar because CPA has not shown an inclination to stop its unreasonable practices, a strong deterrent is necessary and CPA has injured potential tug assist providers and carriers who would request their services. BOE also notes that this proceeding has caused Petchem, a small company, to incur significant legal expenses. BOE Brief at 60.[46]

Based on all of the factors, BOE requests the assessment of a civil penalty in the range of $2,000,000 to $5,000,000. It believes that such a penalty would appropriately punish CPA, deter any future repetition of its behavior and promote compliance with the 1984 Act. BOE Brief at 61. CPA, on the other hand, asserts that the Commission has never imposed a civil penalty, in any amount, upon a public port agency. CPA Reply at 34-35.

CPA vigorously disputes the contention that substantial civil penalties are warranted. Relying on Judge Dolan's statement in *Sea-Land Service Inc.* that deterrence serves "to send strong signal to the industry," slip op. at 165, CPA is substantially correct in noting that a significant civil penalty would not serve as a deterrence because CPA is one of only a few ports that operate a tug franchise system. CPA Reply at 40. However, CPA overlooks its role as a marine terminal

[46] I have not considered Petchem's legal expenses as a factor, since it voluntarily participated m this litigation.

operator and the Commission's obligation to deter such entities from engaging in undue and unreasonable preferences.

It should be noted that the Commission has never assessed a civil penalty in an investigation proceeding, Nevertheless, the presiding judge does not believe that the intent of the 1984 Act would be furthered by assessing a substantial civil penalty against CPA. The factors preponderate in favor of a civil penalty, but not greatly. While it is clear that CPA has, since July 21, 2000 undertaken to preserve Seabulk's monopoly over tug services in Port Canaveral, there is no history of prior offenses, CPA did prevail in its prior litigation on the very same issue and there is a suggestion that CPA's ability to pay may be contingent upon the need to assess an *ad valorem* tax on the port's users. However, imposing a penalty that would have to be passed along to the port's users would be a convoluted and counterproductive approach toward ensuring future compliance with the 1984 Act.

Significantly, and in contrast to all other reported decisions of the Commission, the record is devoid of any proof that CPA obtained any direct financial gain as the result of its unreasonable actions towards prospective tug operators and perpetuation of an exclusive tug franchise system. It is not a profit-making entity and its entire operating revenue is required to be used for the development and operation of Port Canaveral. The CPA Commissioners and staff involved who participated in the actions found to have violated the 1984 Act would not be directly affected by a civil penalty.

BOE contends that each day of the continuing violation constitutes a separate violation of section 10(b)(10) of the 1984 Act. BOE Brief at 58-59. As noted by the Commission in its recently issued decision in Docket No. 02-02, the CPA's violations for refusing to negotiate **with Tugz**

commenced on July 19, 2000 and continued until the date that the RFQ was published on May 20, 2002 and "tolled the clock on CPA's violation" as of that date. *Slip op.* at 41-43. However, the proof, as adduced in this proceeding, indicates that the penalties should be tolled from March 14, 2002, the date of the first prehearing conference, and June 20, 2002. That period of 98 days is comprised of the time that it took to develop and issue the RFQ and the time that it took to await responses from commercial tug prospects. The total amount of days between July 21, 2000 and February 25, 2003, the date that the Initial Decision was due, is 956. After subtracting the 98 days, the penalty period is reduced to 858 days.

Based on a consideration of all of the applicable factors, I believe a civil penalty in the amount of $250 per day is appropriate as a punitive measure with respect to the violations of section 10(d)(1) and as a deterrent to future violations by CPA and other marine terminal operators of section 10(d)(4). At that daily rate, the civil penalty for 858 days of continuing violations is $214,500.

Cease and Desist Order

The Order of Investigation in this proceeding also directed that it be determined whether a cease and desist order should be issued. A respondent may be ordered to cease and desist from committing specific violations and engaging in specific conduct if there is a likelihood the offenses will continue. *Marcella Shipping Co., Ltd., 2 3 S* .R.R. 857, 871 (I.D.), administratively final, March 26, 1986.

BOE contends that a cease and desist order is appropriate because CPA denies culpability and third parties may not directly commence a proceeding against CPA for future violations of the 1984 Act. BOE Brief at 61-62. CPA opposes the imposition of a cease and desist order, or any

other order for that matter, which would have the effect of dismantling its tug services franchise system. It believes that such intrusion into CPA's affairs would violate the Tenth Amendment's prohibition of the federal government from micro-managing matters of State or local concern. CPA Brief at 17-3 1. As discussed, *supra,* CPA's jurisdictional concerns were rejected by the Commission in Docket No. 02-02.

It is clear, based on the long, exclusive relationship between CPA and Seabulk, that an order prohibiting CPA from committing any further unreasonable actions in violation of the 1984 Act would not suffice. Furthermore, based on the testimony of CPA Commissioners and employees, there is absolutely no reason to believe that any modification of the franchise system to another competitive process would result in the selection of any company other than Seabulk for the provision of tug services. The record established that the most sensible approach, which exists at the overwhelming number of ports in this country, is to permit vessels to select their own tug service. The vessels would be in the best position, based on price and quality of equipment and service, to determine who they want to use. Furthermore, it was settled long ago that the duty of ensuring the safety of passengers and the intact delivery of cargo onto port facilities falls upon the vessel, not the port or terminal operator. *The Admiral Peoples, 295* U.S. 649, 653 (1935); *American President Lines, Ltd. v. Federal Maritime Board, 3* 17 F.2d 887, 888 (1962).

Accordingly, CPA shall immediately cease and desist from operating a tug assist franchise system. Vessels calling at the port shall be permitted to use the tug operator of their choosing and CPA shall not prohibit or restrict a vessel from using a tug operator in any way.

Michael A. Rosas
Administrative Law Judge

Washington, D.C.
March 4, 2003